Petition

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NICHOLAS SEREGOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether (a) the Government's use of Mr. Seregos' prior immunized testimony in making tactical decisions in his prosecution, and (b) its cross examination of Mr. Seregos at his own trial about matters disclosed in his immunized testimony and not shown to have had an untainted source, complied with the rule announced in *Kastigar v. United States*, 406 U.S. 441 (1972).

2. Whether the Constitution permits the retroactive application of a decision of this Court to punish conduct under a statute which, at the time the conduct occurred, had been held inapplicable to it by the Court of Appeals.

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NO. _____

IN THE

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OCTOBER TERM, 1981

NICHOLAS SEREGOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioner, Nicholas Seregos, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on July 28, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 655 F.2d 33. It appears in the Appendix hereto at A. 1 - A. 10.* The opinions of the District Court concerning the issues raised in the petition are found at A. 18 - A. 27 (*Kastigar* issues) and A. 28 - A. 32 (Due Process issue).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 28, 1981 (A. 33). On August 7, 1981, Mr. Seregos filed a timely petition for rehearing and a suggestion of rehearing *en banc*; the petition and suggestion were denied on September 14, 1981 (A. 34). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involved application of 18 U.S.C. § 1952, predicated on violation of N. Y. Penal Law §§ 180.03 and 180.08, 18 U.S.C. § 371, the federal use immunity statute (18 U.S.C. §§ 6001 *et seq.*), and the Fifth Amendment to the Constitution of the United States. These are set forth in the Appendix at A. 35 - A. 39.

STATEMENT OF THE CASE

A. The Facts

In 1973 Edward J. Pierson of Moore-McCormack Lines and Richard Weeks of Weeks Stevedoring Co. negotiated a two-year lease, with three six-month renewal options, for a floating

*Citations to the Appendix to this petition are in the above form. References with the prefix "Tr." refer to the transcript of the trial. References with the prefix "H. Tr." or "H.GX." refer respectively to the transcript of, and to the Government exhibits at, the post-trial *Kastigar* hearing. References with the prefix "R." are to the number of a particular paper in the Record on Appeal in the Court of Appeals.

crane to be furnished by Weeks Stevedoring to the Moore-McCormack cargo terminal in Brooklyn, N.Y. (Tr. 35-40; GX. 8). After the lease had been agreed to, Pierson secured Weeks' agreement to pay him a monthly kickback of $1,500.00 (Tr. 38-39, 87).

Using a variety of devices, Weeks made the payments through Pierson's intermediaries at irregular intervals until mid-summer 1976, when Weeks was unable to generate the necessary cash off the books of Weeks Stevedoring (Tr. 44-46). Pierson then sought assistance from William Montella, who was also paying him kickbacks; Montella suggested that Nicholas Seregos, president of Jackson Engineering Co., a ship repair firm, might be of assistance (Tr. 49-52).

According to Pierson, in August or September, 1976, he had the first of several meetings with Mr. Seregos, who had had no previous involvement with Pierson, Weeks or their kickback arrangement (Tr. 53-55). At Pierson's behest, Mr. Seregos prepared a fictitious $25,795 invoice to Weeks Stevedoring for work purportedly done on the crane by Jackson Engineering (Tr. 59-61; GX. 1). When the invoice was paid in December, 1976, Mr. Seregos turned $18,000 over to Pierson, retaining the balance to cover Jackson Engineering's taxes (Tr. 62-64).

Mr. Seregos, who took the stand on his own defense, admitted preparing the false invoice and that the work reflected was not performed. He testified, however, that he had not had the meetings Pierson claimed, that he was unaware of the kickback arrangement between Pierson and Weeks, and that his dealings had been with Montella, to whom he had delivered the $18,000 (Tr. 487-523).

On cross examination the prosecutor asked whether Mr. Seregos had testified falsely before the Waterfront Commission in 1976 and whether he had made payments to employees of Hellenic Lines, a customer of Jackson Engineering Co. Mr. Seregos admitted he had done both (Tr. 555-63, 632-38). The District Judge, who was sitting without jury, referred to each of these admissions either during summations or in his findings of guilt (Tr. 720-21; A. 14-15).

B. Pre-Indictment Events

This prosecution grew out of an investigation in the Southern District of New York and elsewhere into waterfront corruption. A principal target of the investigation was Anthony Scotto, president of Local 1814 of the International Longshoremen's Association* (R. 5).

In the winter of 1979, Mr. Seregos came to the attention of the United States Attorney's Office for the Southern District of New York as a potential witness against Scotto. There followed nearly six months of negotiations during which the United States Attorney's Office offered Mr. Seregos a misdemeanor plea in return for his "cooperation." Mr. Seregos refused any such arrangement out of concern for the safety of his family and his business, although recognizing his obligation to give truthful testimony if subpoenaed and granted use immunity under 18 U.S.C. §§ 6001 *et seq.* (R. 5, R. 6).

C. The First Indictment and The Immunized Testimony

On July 24, 1979, an indictment was handed up in the Southern District of New York charging Mr. Seregos with four counts of mail fraud (18 U.S.C. § 1341) and one count of conspiracy to commit mail fraud (18 U.S.C. § 371), arising out of his involvement in the kickback arrangement between Pierson and Weeks (R. 1). Within an hour of its filing, Mr. Seregos was granted use immunity and appeared before the Grand Jury which had just indicted him (R. 8). He testified not only about his involvement with Scotto but also revealed that he had been forced to make payments to employees of Hellenic Lines, one of Jackson Engineering's customers, in order to retain its business (H.GX. 2; R. 5, R. 6).

In the fall of 1979, Mr. Seregos testified for three days as a Government witness under grant of use immunity at the *Scotto* trial in the Southern District of New York (R. 17 at 4).

**See United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 3109 (1981).

In addition to matters involving Scotto, Mr. Seregos was cross examined at length about (1) the facts underlying his own indictment; (2) his Hellenic Lines payments; and (3) his sworn testimony before the Waterfront Commission in 1976, which he admitted was false. *Id.* His appearance was given extensive coverage in the *New York Times.** *Id.* at 5.

D. Post Indictment Proceedings and Trial

Following Mr. Seregos' July, 1979 indictment on mail fraud charges, the Government secured a postponement of Mr. Seregos' trial "in the interests of justice" until after the *Scotto* trial (R. 4). Thereafter, two of the four substantive counts were dismissed on the Government's concession that venue did not lie in the Southern District of New York (A. 12). The other counts were abandoned when defense counsel brought to the Government's attention that none charged an offense under the mail fraud statute as construed in *United States v. Maze*, 414 U.S. 395 (1974) (Tr. 430-31).**

On February 29, 1980, the Government obtained a superseding indictment charging Mr. Seregos in two counts with conspiracy to violate the Travel Act (Title 18, United States Code, Section 1952), in violation of Title 18, United States Code, Section 371, and with a substantive violation of the Travel Act, alleging that he had traveled in interstate commerce to facilitate the payment of an $18,000 commercial bribe, in violation of N.Y. Penal Law §§ 180.03 and 180.08 (R. 10).

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*The District Court declined to permit either the transcript of Mr. Seregos' immunized *Scotto* testimony or the *New York Times* reports of it to be made part of the record of the *Kastigar* hearing, finding "the connection between these items and the government's evidence during the *Kastigar* hearing to be at best speculative. . ." (A. 27). A copy of the September 29, 1979 *Times* article was printed in an appendix to Mr. Seregos' main brief in the Court of Appeals, and that Court was requested to take judicial notice of it pursuant to Rule 201 of the Federal Rules of Evidence.

**A *nolle prosequi* was entered as to these counts during the pendency of the case before the Court of Appeals.

Trial began on March 27, 1980, and concluded on April 2, 1980, when the Court found Mr. Seregos guilty on both counts.

E. The Kastigar Hearing

The District Court deferred the *Kastigar* hearing, which the Government conceded was required, until after trial (A. 11-12). The Government's proof at the hearing consisted of the record before the Grand Juries that had returned the two indictments and the testimony of Assistant U. S. Attorney Mescon, who conducted the prosecution, and of Special Agent Cassidy of the F.B.I., the "case agent" (H.GX. 1 and 2).

The record before the Grand Jury showed that the evidence in the Government's case-in-chief at trial came from witnesses and documents identified prior to Mr. Seregos' immunized testimony, which followed his first indictment (H. Tr. 10-12; H.GX. 1).

Assistant U. S. Attorney Mescon testified that the *Kastigar* problem had been recognized from the outset and that once it had been decided to indict Mr. Seregos, the United States Attorney, Mr. Fiske,* instructed Mr. Mescon to avoid any exposure to Mr. Seregos' immunized Grand Jury or trial testimony in the *Scotto* case. Mr. Mescon as a consequence did not discuss Mr. Seregos with any other prosecutors working on the Waterfront investigation, did not read Mr. Seregos' immunized Grand Jury or trial testimony in the *Scotto* case or newspaper reports of the case, and did not discuss Mr. Seregos' involvement in the *Scotto* case with anyone except Special Agent Cassidy (H.Tr. 10, 18-20).

Nevertheless, Mr. Mescon admitted that the Government's decisions to seek the postponement of Mr. Seregos' trial until after the *Scotto* trial and its refusal of a disposition of the charges against Mr. Seregos after the *Scotto* trial had been made by Mr. Fiske and Assistant U. S. Attorney Levine, both of

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*Mr. Fiske tried the *Scotto* case, assisted by Assistant United States Attorney Alan Levine, who had taken Mr. Seregos' immunized testimony before the Grand Jury (H. Tr. 37; H.GX. 2). The decision to obtain the indictment against Mr. Seregos was made by Mr. Fiske (H. Tr. 45, 47).

whom were necessarily fully aware of the content of Mr. Seregos' immunized testimony from having conducted the *Scotto* trial (H. Tr. 131-34, 71-74, 117-18). The record also showed without contradiction that the Government's stated reason for refusing to reduce or dismiss the charges against Mr. Seregos had been because of the nature of his admissions in his immunized testimony (H.Tr. 71-74, 117-18, 137-39).* In addition, Mr. Mescon admitted that his decision at Mr. Seregos' trial not to call Montella as a rebuttal witness, made just before Mr. Seregos' cross examination began, was reached in consultation with Mr. Fiske and Mr. Levine** (H. Tr. 32-33, 128-29).

Mr. Mescon testified that, shortly before trial, Special Agent Cassidy informed him of Mr. Seregos' Waterfront Commission testimony, claiming to have learned of Mr. Seregos' appearance before the Commission from electronic surveillance, conducted before Mr. Seregos was immunized, "in which Mr. Seregos was discussed" (H. Tr. 20-24, 55). He testified also that his cross examination of Mr. Seregos concerning payments to Hellenic Lines employees had been suggested by Cassidy the day before Mr. Seregos was cross examined, and that this was his first knowledge of the subject (H. Tr. 78-80, 118). Mr. Mescon did not inquire what information prompted Cassidy's suggestion (H. Tr. 119).

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*It was stipulated that, if called as a witness, defense counsel would have testified that at a meeting with Mr. Fiske and his Assistants, including Mr. Mescon, following the *Scotto* trial, one of the reasons given for the Government's rejection of a disposition of the charges "was the information that Mr. Seregos had revealed while under his grant of immunity. . .", a ground defense counsel further said had been advanced as "the principal one" by Mr. Mescon in their telephone conversation the day after the meeting (H. Tr. 139). When asked at the *Kastigar* hearing whether he recalled saying that in the telephone conversation, Mr. Mescon's response was: "I don't, but I don't recall not telling you that either." (H. Tr. 74).

**Mr. Montella, who had also been a Government witness at the *Scotto* trial, was at the time in the Federal Witness Protection Program (H. Tr. 129-130).

In his testimony, Special Agent Cassidy never explained the source of his suggestion about the Hellenic Lines payments. In contrast to Mr. Mescon, Cassidy claimed to have learned about Mr. Seregos' Waterfront Commission testimony from a recording made by Montella of a conversation *with* Mr. Seregos in August, 1978, but he did not disclose what or who had led him to consult that recording (H.Tr. 95-96). Finally, Cassidy admitted that his instructions for avoiding taint were that he should not discuss "matters about Mr. Seregos as they pertained to things happening post-indictment," but that "[a]nything prior to that we discussed." (H.Tr. 88-89, 103). Cassidy also said that he had been involved in the prosecution and trial preparation of the *Scotto* case and had "sat with Montella kind of on a daily basis." (H.Tr. 85-87, 102).

F. The Motion under Rules 12 and 34 of the Federal Rules of Criminal Procedure

After the verdict, Mr. Seregos made a timely motion in arrest of judgment and for dismissal of the indictment (R. 26, R. 27 at 3 n.1) on the grounds that the evidence at trial showed that all of his conduct had taken place in the latter part of 1976, after the decision of the Court of Appeals in *United States v. Brecht*, 540 F.2d 45 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977), holding that a Travel Act prosecution could not be predicated, as this one was, on violation of the New York commercial bribery statute, and that the retroactive application of this Court's contrary decision in *Perrin v. United States*, 444 U.S. 37 (1979), overruling *Brecht* three years later, violated the Due Process Clause of the Fifth Amendment. *Marks v. United States*, 430 U.S. 188 (1977).

G. The Opinions of the District Court

The District Court denied the motion in arrest of judgment on the ground that Rule 12 required the Due Process claim be raised before trial (A. 28-32). It did not address the merits of the claim.

On the *Kastigar* motion, the District Court found that the Government's case-in-chief at trial had been based on evidence untainted by Mr. Seregos' immunized testimony, and that neither Mr. Mescon nor Special Agent Cassidy had known "the 'substance' " of Mr. Seregos' immunized testimony (A. 23). The District Court gave no consideration to the admitted use of that testimony in making prosecutorial decisions or to the involvement in such decisions of those who were fully aware of the content of such testimony. It also did not address the Government's failure to show that its cross examination of Mr. Seregos about the Hellenic Lines payments and his Waterfront Commission testimony derived from sources untainted by his immunized testimony.

H. The Opinion of the Court of Appeals

The Court of Appeals, although recognizing that the *Kastigar* claims did not concern the Government's direct case at trial, did not discuss those claims and affirmed on the findings of the District Court.

On the Due Process claim, the Court of Appeals apparently disagreed with the District Court's conclusion that the point had to have been raised before trial, an issue which its opinion did not address. Instead, the Court of Appeals rejected the claim on the merits on three grounds. First, the Court relied on this Court's decision in *Perrin v. United States, supra*, as clearly demonstrating that the Travel Act had been intended to include commercial bribery as a predicate offense. Second, it pointed to an earlier decision of the United States Court of Appeals for the Fourth Circuit, *United States v. Pomponio*, 511 F.2d 953 (4th Cir.), *cert. denied*, 423 U.S. 874 (1975), which the Second Circuit expressly refused to follow in *Brecht*, holding that the Travel Act did apply to the New York commercial bribery statute. Finally, the Court held that, given its conclusion that the evidence did show that Mr. Seregos had violated the New York commercial bribery statute, "the argument that he was denied fair notice must be rejected." (A. 7).

REASONS SUPPORTING ISSUANCE OF THE WRIT

This petition raises two issues of general importance to the administration of justice, both arising under the Fifth Amendment.

1. The proper application of *Kastigar v. United States, supra*, touches fundamental values of our society. 406 U.S. at 444. In enacting the use immunity statute, the Congress stripped away a valued constitutional right in return for what the Court emphatically required in *Kastigar* must be its full equivalent. To permit the Government to treat its obligations under *Kastigar* as merely symbolic, as the lower courts have done here, will erode the standard set by *Kastigar*, confirmed in *New Jersey v. Portash*, 440 U.S. 450 (1979), and correctly applied in *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973), a standard from which the Court of Appeals on this record necessarily departed. This case offers the Court the opportunity not only to correct a dangerous erosion of the principles of *Kastigar* and *Portash* but also to settle that those principles extend outside the courtroom to bar the use of immunized testimony in making prosecutorial decisions and tactical judgments in a subsequent prosecution of the immunized witness.

2. The Court of Appeals has permitted the retroactive application of this Court's construction of the Travel Act in *Perrin v. United States, supra*, to conduct which, when performed, was not prohibited by the statute as construed in controlling precedent. *United States v. Brecht, supra*. Such a ruling departs from settled constitutional principles. *Marks v. United States, supra; Bouie v. City of Columbia*, 378 U.S. 347 (1964). It is in direct conflict with a decision of the United States Court of Appeals for the Ninth Circuit filed only one day earlier, *United States v. Goodheim*, 651 F.2d 1294 (9th Cir. 1981), and with *United States ex rel Clark v. Anderson*, 502 F.2d 1080 (3d Cir. 1974) (Hastie J.). The result reached by the Court of Appeals calls into question fundamental constitutional

principles nearly as old as the Court itself, *Calder v. Bull*, 3 Dall. 386 (1798), and reaffirmed as recently as the last Term. *Weaver v. Graham*, 450 U.S. 24 (1981).

I.

The Court of Appeals has Departed from the Requirements of *Kastigar*.

The familiar teachings of *Kastigar* are that both statutory provision and constitutional requirement prohibit the Government from using "in *any* respect," 406 U.S. at 453 (emphasis in original), a witness's immunized testimony in connection with his subsequent prosecution. The "heavy" burden of showing that no such use has been made is imposed on the Government, and its discharge requires not only the negation of taint, but also an affirmative demonstration that the Government's case has been derived from sources wholly independent of the immunized testimony. 406 U.S. at 460.

The constitutional and statutory bar against any use of immunized testimony clearly extends beyond the Government's direct case at trial and includes cross examination of the defendant. *New Jersey v. Portash, supra. Kastigar* also shows that subtler forms of use outside the courtroom—"leads, names of witnesses, or other information not otherwise available. . ."—are similarly embraced in the statute's constitutionally mandated "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." 406 U.S. at 459-460. The breadth of this prohibition has been correctly understood by the United States Court of Appeals for the Eighth Circuit as potentially including "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel, supra*, 482 F.2d at 311.

The record before the Court of Appeals in this case established that the United States Attorney had refused to agree to a favorable disposition of the charges, following Mr. Seregos' immunized testimony at the *Scotto* trial, on the stated ground

of the admissions made in his immunized testimony (H.Tr. 71-74, 117-18, 137-39). It also showed that critical trial strategy was planned by the prosecutor in consultation with the United States Attorney and another Assistant United States Attorney who had conducted the *Scotto* trial and the Grand Jury proceedings at which Mr. Seregos testified at length under grant of use immunity (H.Tr. 32-33, 128-29, 131-34). Finally, the record reflected that two of the subjects of cross examination with the greatest impact on the District Judge at this bench trial were Mr. Seregos' payments to Hellenic Lines employees and his admittedly false testimony before the Waterfront Commission, both of which had been revealed in his immunized testimony (R. 17; H.GX. 2; Tr. 720-21; A. 14-15). No untainted source—indeed no source at all—was offered at the *Kastigar* hearing for the questioning about the Hellenic Lines payments, and the source advanced for the Waterfront Commission testimony was the subject of inconsistent and incomplete testimony. (*Compare* H.Tr. 22-23 with H.Tr. 95-96, 100-101).

The District Court passed over all of this in silence, and the Court of Appeals, although recognizing the nature of Mr. Seregos' claims, could "see no reason to question" findings which the District Court had never made (A. 10). Although in this case the violence to the constitutional principles announced in *Kastigar* is hidden by the silence of the lower courts, that fact lessens not at all the conflict between the decisions below and those in *Kastigar*, *Portash* and *McDaniel*.

Two further reasons suggest the appropriateness of the Court's exercise of its discretionary jurisdiction.

First, from the time that it was decided to indict Mr. Seregos to enhance his credibility as an immunized Government witness against Scotto, the United States Attorney, his Assistants, and the F.B.I. were well aware of the *Kastigar* problem thus created. Thus, in contrast to the usual case, the failure to comply with *Kastigar's* requirements lacks the sympathetic circumstance of the recognition by the Government of a duty to prosecute an immunized witness unforeseen at the time that it was exposed to his immunized testimony. Here, the Government proceeded from the outset with a full awareness of

its *Kastigar* obligations, or perhaps, judging from Cassidy's transparently inadequate instructions, despite them.

Second, the integrity of the constitutional imperatives of *Kastigar* is crucial to the administration of justice. There is no other instance in which the law provides a compulsory substitute for a recognized constitutional privilege. The constitutionality of the immunity statute rests upon the Court's conclusion in *Kastigar* that it "is coextensive with the privilege and suffices to supplant it." 406 U.S. at 462. Its erosion, even in the studied silence which pervades the opinions below, jeopardizes not only the rights of citizens to whom it is applied but also its continued availability as a legitimate tool in the fight against crime.

II.

The Ex Post Facto Application Of The Travel Act To Mr. Seregos Violated The Due Process Clause.

Having originally been indicted on mail fraud charges the Government could not prove, Mr. Seregos was subsequently charged and convicted in the Southern District of New York for a substantive violation of the Travel Act and for conspiracy to violate the Travel Act. The state law predicate for both counts was commercial bribery in violation of the N. Y. Penal Law §§ 180.03 and 180.08.

Both the indictment and the proof at trial, taken most favorably to the Government, showed that Mr. Seregos' involvement had begun no earlier than August or September, 1976 (Tr. 51-52, 54) and concluded in December, 1976.

On July 16, 1976, prior to any act by Mr. Seregos in this case, the United States Court of Appeals for the Second Circuit had held in *United States v. Brecht, supra*, that the Travel Act did not apply to acts of commercial bribery in violation of the New York Penal Law. The decision of the Court of Appeals in *Brecht*, of which the Government did not seek review in this Court,* remained the law of the Second Circuit for over three

*The denial of certiorari noted in the citation to *Brecht* is of Brecht's petition for review of his Hobbs Act conviction, which the Court of Appeals had affirmed.

years until this Court held that the Travel Act did apply to commercial bribery and in substance overruled *Brecht*. *Perrin v. United States, supra.*

The District Court described the circumstances of the superseding indictment as follows:

> The superseding indictment filed on February 29, 1980 was merely designed to change the government's legal theory from one based upon the mail fraud statute to one based upon the Travel Act, following a Supreme Court decision in *United States v. Perrin* (sic), 48 U.S.L.W. 4009 (November 27, 1979), which changed the law in this Circuit.

(A. 23). But whatever the Government's purpose, the retroactive application of the construction of the Travel Act in *Perrin* to Mr. Seregos' conduct three years earlier, at a time when *Brecht* was the governing law, violated the Due Process Clause of the Fifth Amendment under *Bouie v. City of Columbia, supra,* and *Marks v. United States, supra,* which teach that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids." *Bouie v. City of Columbia, supra,* 378 U.S. at 353, *quoted with approval in Marks v. United States, supra,* 430 U.S. at 192. *See also Douglas v. Buder,* 412 U.S. 430 (1973).

Bouie, in which the "foreseeability" test was formulated, involved the "expansive construction," *Marks v. United States, supra,* 430 U.S. at 195, of a state criminal statute to conduct to which it had not been previously applied, although no precedent stood in the way. There the Court examined the language of the statute and its application for the preceding century to determine whether these gave sufficient warning, that is, made it "foreseeable," that the statute would be construed to forbid the conduct of the petitioners in that case. Answering that question in the negative, the Court held that the Due Process Clause precluded application of the statute to petitioners' conduct.

Marks posed a similar issue but with the added element, present in this case but not in *Bouie*, that the newly expanded construction of the statute overturned existing precedent to the contrary. In *Marks* the Court found the *Bouie* test of foreseeability satisfied simply by its determination that the most recent definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973), criminalized conduct under 18 U.S.C. § 1465 which had been beyond the scope of the statute under the Court's earlier formulation in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Because of its conclusion that, under the new *Miller* standard, "some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*", the Court held in *Marks* that "the Due Process Clause precludes the application to petitioners of the standards announced in *Miller v. California*, to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs*." 430 U.S. at 194, 196.

Precisely this principle precludes the application to Mr. Seregos of the construction of the Travel Act announced in *Perrin v. United States, supra*, to the extent that it imposes criminal liability for conduct not punishable under *Brecht*, for there is no dispute that under *Brecht* the Travel Act did not then apply to what Mr. Seregos has been convicted of doing. While *Brecht* was not, as *Memoirs* was, a decision of this Court, that fact is immaterial to the application of the constitutional principle. *United States v. Peltier*, 422 U.S. 531, 541-42 (1975). *See also United States v. Goodheim, supra; United States v. Potts*, 528 F.2d 883, 886 (9th Cir. 1975) (*en banc*).

The rule of law for which we contend is precisely that adopted by the Ninth Circuit in *Goodheim*. There the Court of Appeals held that *Bouie* and *Marks* precluded the retroactive enforcement in that Circuit of a decision of this Court which overruled the restrictive construction of the predicate felony provisions of the federal firearms laws followed in the Ninth Circuit, and which adopted instead a more expansive reading of those statutes favored by other Courts of Appeals. In this case, the Second Circuit has taken the opposite position in an indistinguishable context on grounds that do not survive even cursory analysis.

First, relying with hindsight on *Perrin*, the Court of Appeals found that "there is nothing vague or indefinite about 'bribery' as used in the Travel Act. . ." (A. 7). Such a suggestion is sufficiently refuted by the fact that in the three cases in the Court of Appeals prior to this Court's decision in *Perrin*, *United States v. Pomponio, supra; United States v. Brecht, supra*; and *United States v. Perrin*, 580 F.2d 730 (5th Cir. 1978), the judges of the Courts of Appeals had divided five to four on whether "bribery" in the Travel Act was meant to include commercial bribery. The uncertainty was no greater in *Goodheim*.

Second, the Court of Appeals thought that *Perrin* could not be viewed as "unforeseeable" within the meaning of *Bouie* because of the Fourth Circuit's conclusion in *United States v. Pomponio, supra*, that the Travel Act applied to commercial bribery. However, this view of retroactivity, diametrically opposed to the Ninth Circuit's in *Goodheim*, both ignored that it was *Brecht*, and not *Pomponio*, which was the law of the Second Circuit until *Perrin* and necessarily read *Bouie* too narrowly for contexts where, as here and in *Marks*, what is involved is the overruling of controlling precedent and not merely an expansive interpretation of a statute by a court writing on an arguably clean state. Moreover, the view that a Due Process claim resting on *Brecht* was foreclosed by the contrary view of the Fourth Circuit in *Pomponio* overlooked that *Marks* was written against the background of a splintered division of the Court, *see id.* at 193-194 and *Miller v. California, supra*, 413 U.S. at 20-22, and that judicial disagreement on the scope of a statute does not supply the "clear and definite statement of the conduct proscribed," *United States v. Persky*, 520 F.2d 283, 288 (2d Cir. 1975), required by the Due Process Clause. Indeed, the uncertainty prior to *Miller* was as clearly a harbinger of doctrinal change as the disagreement between the Fourth and Second Circuits on the scope of the Travel Act, but *Marks* shows that such premonitions are no basis for criminalizing conduct retrospectively. The "speculative anticipation of a series of future judicial rulings is not the stuff out of which adequate notice can be fashioned." *United States ex rel. Clark v. Anderson, supra*, 502 F.2d at 1083.

Finally, the Court of Appeals found that a retroactive application of *Perrin's* expansive construction of the Travel Act was authorized by its conclusion that Mr. Seregos' conduct violated the New York commercial bribery statute. However, the contrary is clearly shown by the principle underlying *Bouie* that " 'the required criminal law must have existed when the conduct in issue occurred. . .' " 378 U.S. at 354. *See also United States v. Goodheim*. It is also demonstrated by this Court's refusal to borrow precedent from other jurisdictions or from local tort law to sustain the retroactive application of the expansive construction of the statute at issue in *Bouie v. City of Columbia, supra*, 378 U.S. at 357-60, and by persuasive authority which has rejected the same position taken here by the Court of Appeals in a context analytically more sympathetic to it. *United States ex rel. Clark v. Anderson, supra.*

Moreover, Mr. Seregos was convicted, not of commercial bribery, but rather of the quite different offense of "interstate travel with the intent to 'promote, manage, establish, carry on, or facilitate' certain kinds of illegal activity," *Rewis v. United States*, 401 U.S. 808, 811 (1971). The prohibitions of the former can hardly be said to authorize retroactive application of the latter, particularly in light of the substantially greater penal and civil consequences of conviction under a federal felony statute, rather than a state law misdemeanor provision. *See Bouie v. City of Columbia, supra*, 378 U.S. at 353; *Calder v. Bull, supra*, 3 Dall. at 390. Furthermore, since in imposing penalties for violation of the Travel Act the United States acts as a separate sovereign enforcing its own laws, *Abbate v. United States*, 359 U.S. 187 (1959), *its* constitutional obligation to give fair notice of what *its* law forbids can hardly be satisfied by reference to the notice provided by a different sovereign for a violation of such a different character. *See Bouie v. City of Columbia, supra*, 378 U.S. at 353 n.4. Instead, since the constitutional issue here arises because of ambiguity in the definition in Section 1952(b) of state law predicate offenses under the Travel Act, the existence of a state law against commercial bribery, far from supplying fair notice of the breadth of the Travel Act, is simply irrelevant. *See Rewis v. United States, supra*, 401 U.S. at 811-12.

CONCLUSION

If permitted to stand, the decision of the Court of Appeals will create uncertainty and perpetuate division in the Circuits about two fundamental and recurring issues of Constitutional principle. The decision of the Court of Appeals departs substantially from settled authority of this Court and from the decision of other Courts of Appeals which have adhered to it.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 732—September Term, 1980

(Argued February 24, 1981 Decided July 28, 1981)

Docket No. 80-1403

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

NICHOLAS SEREGOS,

Defendant-Appellant.

Before:

FEINBERG, *Chief Judge,*
OAKES, *Circuit Judge,* and
NEAHER, *District Judge.**

Appeal from a judgment of conviction entered after a bench trial in the United States District Court for the

* Honorable Edward R. Neaher, Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Southern District of New York, Lawrence W. Pierce, *Judge*, convicting appellant of conspiracy to violate the Travel Act, 18 U.S.C. §§ 1952 and 371, and of a substantive violation of that Act.

Affirmed.

JOHN D. GORDAN, III, New York, N.Y. (Laurie E. Foster, of Counsel), *for Defendant-Appellant.*

RICHARD A. MESCON, Assistant United States Attorney, New York, N.Y. (John S. Martin, Jr., United States Attorney for the Southern District of New York, New York, N.Y., of Counsel; Mary Jo White, Assistant United States Attorney, on the Brief), *for Appellee.*

NEAHER, *District Judge*:

This appeal presents another facet of the unlawful activity "that has plagued waterfront businesses in New York and New Jersey." See *United States v. Clemente*, 642 F.2d 1069, 1071 (2d Cir. 1981). The actors here were all businessmen on the waterfront who might have been expected to shun the illicit conduct which led to appellant's indictment and conviction.

Appellant (hereinafter "Seregos") was convicted after a bench trial in the Southern District of New York before Lawrence W. Pierce, J., for traveling from New Jersey to New York to facilitate the payment of a commercial bribe and conspiracy to commit that offense, 18 U.S.C. §§ 1952, 2 and 371, in connection with a business trans-

action between a shipping company and a stevedoring concern. Since appellant challenges the sufficiency of the evidence to support his conviction, a more detailed recital of the essential facts established at trial is required. The evidence must, of course, be viewed in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 80 (1942).

In 1976, and for some years before, Seregos was president of Jackson Engineering Co., a ship repair business founded by his father in Hoboken, New Jersey, in which State Seregos lives and works. Seregos' difficulties began when he was induced to assist the carrying out of a corrupt kickback arrangement between two other businessmen, who later testified against him at trial after pleading guilty to mail fraud charges. One of these businessmen was Edward Pierson, then an executive of Moore-McCormack Lines, whose terminal and office was in Brooklyn; the other was Richard Weeks, president of Weeks Stevedoring Co., headquartered in New Jersey.

In 1973 Pierson and Weeks had negotiated the rental of a Weeks Stevedoring Co. floating crane for use by Moore-McCormack during a two-year period with three six-month renewal options. The rental to be paid Weeks was $15,500 monthly, a figure that included a $1500 per month kickback to Pierson to be paid in cash. Weeks had difficulty raising the cash to make the kickback payments and by 1976 had fallen behind by some $18,000. Pierson then sought the assistance of William Montella,[1] who suggested that Seregos might be able to provide a false invoice that Pierson proposed as a way to raise cash for Weeks.

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[1] Montella, an employee of Quin Marine Division of McGrath Industries, was a key government witness in *United States v. Scotto,* 641 F.2d 47 (2d Cir. 1980), *cert. denied,* 49 U.S.L.W. 3954 (U.S. June 22, 1981), and *United States v. Clemente, supra.*

Seregos, testifying in his own behalf, denied knowledge of the illicit arrangement between Weeks and Pierson, maintaining that his only contacts were with Montella, not Pierson. He admitted, however, that after a series of telephone conversations with Montella and an inspection of the Weeks crane at Moore-McCormack's Brooklyn terminal, he submitted a Jackson Engineering Co. invoice to Weeks Stevedoring for repairs to the crane totaling $25,795, which in fact were never performed. The books of Jackson Engineering and other trial exhibits reflected that the invoice was paid by Weeks by check dated December 2, 1976.

Seregos also admitted that on December 3 he prepared two Jackson Engineering checks, each in the amount of $9,027.50, one drawn to James Cannino and the other to Alvin Raphael. He testified he gave both to Cannino on December 7 and received a package containing $18,000 in cash, which he then delivered to Montella in Brooklyn. Seregos further admitted meeting Pierson and Montella that night at Ponte's restaurant in Manhattan, but testified he stayed only five minutes and there was no discussion of money.

Pierson, testifying for the government, contradicted Seregos' disclaimer of knowledge regarding the kickback arrangement. According to Pierson, Seregos came to his office at the Moore-McCormack terminal in Brooklyn, in August or September 1976, where Pierson told him that he "had a private arrangement with Mr. Weeks, and I needed an invoice because he had to pay me some money . . . and could he, Mr. Seregos, write up an invoice on the crane." Subsequently, according to Pierson, Seregos delivered the invoice, dated October 18, 1976, to Pierson at the latter's office and Pierson later gave it to Weeks, who said it would be "okay." Finally, Pierson testified, it

was Seregos who arranged to meet him at Ponte's restaurant and delivered to him in the men's room the envelope containing the $18,000 in cash.

The conflict in the testimony bearing upon Seregos' knowledge and intent obviously presented an issue of credibility for the trier of the fact. *United States v. Minor*, 398 F.2d 511, 512 (2d Cir. 1968), *aff'd*, 396 U.S. 87 (1969). In resolving that issue against Seregos, Judge Pierce properly considered appellant's demeanor, his qualified answers and his admitted false testimony under oath before the Waterfront Commission, as well as the inferences that could reasonably be drawn from Seregos' readiness to participate in plainly dishonest conduct. Factual findings by the trial judge as to the requisite knowledge and intent to engage in unlawful conduct may not be set aside unless on review of the record they are found to be clearly erroneous. *United States v. Rischard*, 471 F.2d 105, 107 (8th Cir. 1973); see *United States v. Abel*, 258 F.2d 485, 494 (2d Cir. 1958), *aff'd*, 362 U.S. 217 (1960). See also *United States v. Sheard*, 473 F.2d 139, 146 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). On this record such a finding cannot be made, and the critical issues of credibility having been resolved against appellant, the evidence was clearly sufficient to establish all elements of the offenses charged.

We now turn to the three principal arguments advanced by appellant, none of which we conclude warrants reversal of his conviction.

Lack of Fair Notice

Appellant contends that he did not have fair notice that his conduct in the latter part of 1976 was in violation of the Travel Act. That contention is premised on this Court's decision on July 16, 1976, in *United States v.*

Brecht, 540 F.2d 45 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977), holding that the Travel Act did not apply to acts of commercial bribery in violation of the New York Penal Law. The *Brecht* court, however, acknowledged that its ruling was in conflict with the prior decision of the Fourth Circuit in *United States v. Pomponio*, 511 F.2d 953 (4th Cir.), *cert. denied*, 423 U.S. 874 (1975), *id.* at 48, which had held that the Travel Act applied not only to bribery of public officials but extended to interstate travel to facilitate commercial bribery as defined in N.Y. Penal Law § 180.00, the predecessor of the statutes involved in this case. 511 F.2d at 955-56.

This Court's decision in *Brecht* was subsequently overruled by the Supreme Court in *Perrin v. United States*, 444 U.S. 37, decided November 27, 1979, which, after noting the conflict among circuits, upheld the views of the Fourth and Fifth Circuits that bribery of private employees prohibited by State criminal statutes could also violate the Travel Act. See *United States v. Pomponio*, *supra*, and *Perrin v. United States*, 580 F.2d 730 (5th Cir. 1978).

Following the Supreme Court's ruling in *Perrin*, the government filed a superseding indictment on February 29, 1980, charging appellant with the Travel Act offenses of which he was convicted.[1] Relying on *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977), his basic contention is that the *Perrin* ruling was "an unforeseeable judicial enlargement of a criminal statute," which, when "applied retroactively, operates precisely like an *ex post facto* law" forbidden by the Constitution, quoting from *Bouie*, *supra*, 378 U.S. at 353. Our reading of those cases satisfies

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1 Seregos was originally indicted July 24, 1979 on five counts of mail fraud based on the same transactions as the Travel Act charges.

us that they provide no support for a claim of lack of fair warning here. Granted that the deprivation of such a right can result from "vague statutory language" or "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language," *Bouie, supra,* at 352, neither element is present in this case.

As the Supreme Court pointed out in *Perrin,* at the time the Travel Act was enacted in 1961, both "federal and state statutes had extended the term bribery well beyond its common law meaning." 444 U.S. at 43. And New York as early as 1905 was one of the States which had outlawed commercial bribery generally. *Id.* at 44, n.9. Thus there is nothing vague or indefinite about "bribery" as used in the Travel Act; nor can *Perrin* be viewed as an unforeseeable judicial expansion of the scope of the Act in light of *Pomponio, supra,* which dealt specifically with the New York commercial bribery statute. And in view of Seregos' admittedly illicit activities, which we conclude below violated that statute, the argument that he was denied fair notice must be rejected.[3]

Absence of "Bribery" Under State Law

Appellant argues next that the underlying transaction between Weeks and Pierson that he facilitated did not constitute the crime of commercial bribery under State law. Essentially he contends that the kickback payment arrangement was actually either a fraud upon or embezzlement from Moore-McCormack and lacked the element

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3 Seregos, of course, was not required to know that his activities became a federal crime because of interstate travel, even though the government had to prove such travel as an essential element. *United States v. Perrin, supra,* 580 F.2d at 737; *United States v. Marquez,* 424 F.2d 236, 240 (2d Cir.), *cert. denied,* 400 U.S. 828 (1970).

of "intent to influence" necessary for commercial bribery under the New York statute.[4]

We disagree. Accepting as we must the trial court's findings that the $1500 monthly kickback paid by Weeks to Pierson personally was an integral part of the negotiations resulting in the crane rental agreement, without the knowledge or consent of Pierson's employer, all the requisite elements of commercial bribing and commercial bribe receiving were present. Section 180.03 is drawn in terms of "confer[ring] any benefit" upon an "employee, agent or fiduciary . . . with intent to influence his conduct in relation to his employer's . . . affairs . . . ." Weeks' conduct precisely satisfied those terms. By agreeing to Pierson's proposal, Weeks not only assured the contract for his company but also provided the means whereby Pierson could receive the benefit of the kickback payments unknown to his employer. And Weeks' acquies-

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4 N.Y. Penal Law criminalizes both the giving and receiving of a commercial bribe in separate provisions as follows:

"§ 180.03 Commercial bribing in the first degree

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars."

"§ 180.08 Commercial bribe receiving in the first degree

An employee, agent or fiduciary is guilty of commercial bribe receiving in the first degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceeds one thousand dollars."

Each offense is a class A misdemeanor.

cence in the scheme clearly influenced Pierson to commit Moore-McCormack to rent the crane at the higher monthly rate.[5] That the source of the funds was Pierson's employer does not mean that Weeks and Pierson were not engaging in commercial bribery. See *Palmer v. Doull Miller Co.*, 233 F. 309, 312 (S.D.N.Y. 1916) (construing predecessor bribery statute, N.Y. Penal Law § 439, as condemning scheme to charge corporate customer inflated factor's commissions so as to provide undisclosed payments by factor to customer's president). Concluding that the arrangement for the kickback payments was commercial bribery under New York law, we find it unnecessary to consider whether such conduct also violated other criminal laws, as appellant suggests.

Impermissible Use of Immunized Testimony

Appellant's final argument accuses the government of having cross-examined him at trial regarding matters as to which he had previously testified under a grant of immunity before the grand jury which indicted Anthony Scotto and as a government witness at Scotto's trial.[6] In addition, Seregos claims that the government's decisions not to renew an offer of a misdemeanor plea he had previously rejected, and not to call William Montella as a rebuttal witness at his trial, were also tainted by knowledge of his immunized testimony imputable to the prosecutor.

In view of these allegations, Judge Pierce properly conducted a *Kastigar*[7] hearing to determine whether the

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5 Weeks testified that absent the kickback payments to Pierson, the rental charge to Moore-McCormack would have been "about $14,000." Tr. 320.

6 See *United States v. Scotto, supra*, n.1.

7 See *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

government could meet its burden of showing that the evidence used against Seregos was free from the taint of compelled testimony. After two days of testimony from the Assistant United States Attorney responsible for Seregos' prosecution, and the F.B.I. case agent who conducted the investigation, both of whom he found "highly credible," Judge Pierce concluded in a detailed opinion that the evidence against Seregos was independently derived from subpoenaed records and documents and the debriefing of Pierson and Weeks and was not tainted by Seregos' testimony in the Scotto case. He also found that the prosecutor and agent had sufficiently insulated themselves from the Scotto proceedings and those responsible for that prosecution. From our independent review of that record we see no reason to question Judge Pierce's findings. See *United States v. King*, 560 F.2d 122, 131 (2d Cir.), *cert. denied*, 434 U.S. 925 (1977). Accordingly, we find this claim to be without merit.

We have considered appellant's other contentions and find them also to be without merit.

Affirmed.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICHOLAS SEREGOS,
Defendant-Appellant.

79 Cr. 564

United States District Court,
Southern District of New York.

Filed: February 26, 1980

ORDER

Defendant Nicholas Seregos has made a number of pre-trial motions; the Court rules on these motions as follows:

(1) Defendant's motion to dismiss the indictment with prejudice upon the grounds that the Government's evidence is in part derived from the defendant's testimony given under orders of immunity is hereby denied. The Government, through an uncontested affidavit, has demonstrated that the evidence leading to an indictment in this matter was presented to the Grand Jury prior to defendant's immunized testimony. The Court has conducted an *in camera* inspection of the minutes of defendant's immunized testimony and finds the Government's affidavit to be substantiated by the minutes. Thus, since no immunized testimony existed at the time of the filing of the instant indictment, it is not necessary for the Court to conduct a hearing on this issue under *Kastigar v. United States*, 406 U.S. 441 (1972).

(2) A hearing is mandated with respect to the defendant's claim that the Government's trial evidence may be tainted by his immunized testimony. *See Kastigar, supra.* This hearing

should be conducted after the jury's verdict, should the defendant be found guilty. A number of factors lead the Court to make this discretionary decision [*see Nardone v. United States*, 308 U.S. 338, 342 (1939)]; the primary factors are: (a) that it is obvious that even if there were a pre-trial taint hearing, a post-trial hearing would still be required based upon thus far unknown testimony which may be elicited on cross-examination and possible rebuttal evidence; and (b) to avoid giving the defendant an unfair preview of the Government's evidence.

(3) Defendant's motion for an order pursuant to Rule 16 of the Fed. Rules of Civ. Proc. requiring the Government to produce a copy of the minutes of his testimony before the Grand Jury is denied. As stated above, the Court has made an *in camera* inspection of these minutes and finds that the testimony given is not related to the offenses charged in the instant indictment. Defendant is given leave to renew this motion at the time of the post-trial taint hearing, if one is required in this case.

(4) Defendant is not entitled to the requested order for production of all grand jury testimony relating to the charges in the instant indictment, as he has not made the requisite showing of "particularized need". *United States v. Dennis*, 384 U.S. 855, 870-71 (1966).

(5) Defendant's motion for an order directing the Government to comply with the mandates of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny is hereby granted.

(6) Defendant's motion for an order adjourning the date for filing motions is denied, but defendant is granted leave to renew this motion, with permission of the Court, upon a showing of good cause.

(7) Defendant's motion for an order dismissing Counts 4 and 5 of this indictment (79 Cr. 564) is hereby granted pursuant to Rules 12 and 18 of the Fed. Rules of Crim. Proc., on

the grounds that this Court is without jurisdiction over the offenses charged, since venue does not lie in the Southern District of New York.

SO ORDERED.

Dated: New York, New York
February 22, 1980

/s/

LAWRENCE W. PIERCE
U.S.D.J.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICHOLAS SEREGOS,
Defendant-Appellant.

S79 Cr. 564

United States District Court,
Southern District of New York.

(Pages 727-732 of the Trial Transcript,
April 2, 1980)

Filed: October 31, 1980

VERDICT OF THE COURT

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(T. 727) THE COURT: All right.

Mr. Dearie has made a Rule 29 motion. The motion is denied. The defendant is found guilty of counts one and two.

The first issue to be addressed is that of credibility. I have sat here and I have observed the inflections of the voices of the witnesses, their conduct and their demeanor while testifying. I have reviewed the testimony searching for consistencies and inconsistencies, and while Mr. Dearie has noted Mr. Pierson's inability to recall certain events with great particularity, I noted as well the inability of the defendant to recall over and over again without the use of qualifying words so many of the matters about which Mr. Seregos testified, seemingly constantly hedging his answers, answers relating to where certain events occurred, who was present, in what sequence did events occur and what was said.

In a case involving very closely as here the issue of who to believe, the acknowledgment by the defendant Seregos that on

a prior occasion, while testifying under oath he lied, assumes greater importance in resolving whether to find that witness's testimony credible here.

Applying one's common sense to the evidence, (T. 728) at least attempting to do so, and undertaking to assess how illegal deals are worked out, the discussion of the details of criminal acts in specific terms over the telephone on the facts presented in this particular case is an unreasonable and unwarranted conclusion here in my view.

Accepting as credible the testimony of Mr. Pierson as to what he told Mr. Seregos about the lease by Moore-McCormack of a crane from Weeks Stevedoring Company, and the reference to an arrangement with Richard Weeks, and the need for a known phony invoice, I find, and the reasonable inferences to be drawn from the evidence sufficient to establish that Mr. Seregos knowingly and willfully traveled interstate to facilitate and promote a violation of commercial bribery and commercial bribery receiving statutes as set forth as prohibited in sections 180.03 and 180.08 of the New York State Penal Law.

I additionally make the following findings of fact: In May of 1973, Moore-McCormack Lines, Inc. and Weeks Stevedoring Company, Inc. entered into an agreement whereby Moore-McCormack rented a floating crane from Weeks for $15,500 per month. The rental agreement was for a period of two years to commence 90 days after the crane was delivered to Moore-McCormack.

(T. 729) Moore-McCormack had the option to extend the agreement for three six month periods.

The individuals who negotiated this agreement were Edward Pierson, assistant vice-president of Moore-McCormack, and Richard Weeks, president of Weeks Stevedoring.

In 1973 Pierson and Richard Weeks also agreed that Weeks Stevedoring would pay a kickback to Pierson in the amount of $1,500 per month for the duration of the crane rental agreement.

The crane rental agreement went into effect in 1973. Moore-McCormack, acting through Pierson, exercised its six month options effective November, 1975, May of 1976 and

November of 1976. Pierson received payments from Richard Weeks during this three and a half year period with payments in the approximate amount of $1,500 per month.

Pierson accepted these kickbacks without the knowledge or consent of Moore-McCormack. During 1976, Pierson had a conversation with William Montella, who was employed by Quin Marine Services, and who was found by this court to be a co-conspirator with reference to the conspiracy charged in count one.

Pierson told Montella that Weeks Stevedoring (T. 730) was having difficulty raising cash to pay Pierson and needed a third party means of collecting from Weeks, such as a false invoice. Montella told Pierson that Nick Seregos of Jackson Engineering might be able to prepare a false invoice to Weeks Stevedoring for repair of the crane and pay Pierson after Jackson Engineering received payment on the invoice.

During the summer of 1976, Seregos met with Pierson at Pierson's office in Brooklyn. During this meeting, Pierson told Seregos that Moore-McCormack was renting a crane from Weeks Stevedoring, and that Pierson was receiving money from Weeks Stevedoring, at least from Richard Weeks of Weeks Stevedoring. Pierson asked Seregos if Jackson Engineering could submit a false invoice to Weeks Stevedoring and after the invoice was paid, give Pierson the money.

Seregos said he would do this but would have to keep some of the money received from Weeks Stevedoring.

Subsequently, Seregos gave Pierson a detailed invoice for repair work on the Weeks crane rented by Moore-McCormack. Pierson gave the invoice to Richard Weeks who told Pierson it needed correction.

Pierson returned the invoice to Seregos.

On or about October 18, 1976, Seregos gave the (T. 731) corrected invoice to Pierson who in turn gave it to Richard Weeks. That would be Government's Exhibit 1 in evidence.

Jackson Engineering never did any of the work set forth in 1 in evidence. In early December, 1976, Weeks Stevedoring issued its check, check bearing No. 8363, Government's Exhibit 2 in evidence in the amount of $25,795 to Jackson Engineering in payment of the false invoice.

(T. 732) In December of 1976 Seregos called Pierson and told Pierson that he wanted to meet with him.

Seregos and Pierson arranged to meet at Ponte's Restaurant in Manhattan.

In December of 1976 Seregos gave approximately $18,000 in cash to Pierson in the men's room at Ponte's Restaurant in Manhattan, which money he knew to be the proceeds of a commercial bribe.

During 1976 Seregos lived and worked in New Jersey, and traveled to Brooklyn and Manhattan for his meeting with Pierson, with the intent to further the payment of cash kickbacks to Pierson.

Now there is an outstanding motion - -

Well, to conclude, then, the Court finds beyond a reasonable doubt the defendant to be guilty of Counts 1 and 2.

Sentence will be deferred. No date is set at this time while we await the Government's response to Mr. Dearie's motion.

How long do you wish, Mr. Mescon?

****

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICHOLAS SEREGOS,
Defendant-Appellant.

579 Cr. 564

United States District Court,
Southern District of New York.

Filed: August 4, 1980

APPEARANCES:

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LAWRENCE W. PIERCE, D.J.

OPINION

On April 2, 1980, following a five day non-jury trial, defendant Nicholas Seregos was found guilty on both counts of a two-count superseding indictment. In summary, he was found guilty of conspiring to violate the Federal Travel Act under 18 U.S.C. § 371 and of violating the federal Travel Act, 18 U.S.C. § 1952. On January 10, 1980, the then attorney for Seregos, Raymond Dearie, Esq.,[1] filed a pre-trial motion requesting, among other things, an Order of this Court pursuant to Rule 12, Fed.R.Cr.P., and under the inherent and supervisory powers of this Court, dismissing the indictment with prejudice upon the grounds that the government's evidence was in part derived from immunized testimony of Seregos. In the alternative, defendant sought an Order directing that a hearing be held and that the government be required to demonstrate to the satisfaction of this Court that the evidence presented to the grand jury and at the trial was derived from a source wholly independent of the immunized testimony of Seregos which was given in connection with the indictment and trial of Anthony Scotto (a "Kastigar hearing").

In an Order dated February 22, 1980, the Court denied the request for pre-trial dismissal of the indictment, but reserved decision on the Kastigar motion directing that a post-trial hearing be conducted, if necessary, under *Kastigar v. United States*, 406 U.S. 441 (1972), to determine if the evidence presented at the grand jury proceedings and trial were derived from a source wholly independent of the immunized testimony.

The defendant was found guilty on April 2, 1980, and a Kastigar hearing was held on July 1 and 2, 1980. It is initially noted that under *Kastigar v. United States, supra*, the burden is completely on the government to demonstrate the independent source of the evidence. This Court holds that the government

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[1] Raymond Dearie, Esq., was relieved as counsel in this case via an Order dated July 10, 1980 upon the Court having been informed that he had accepted a governmental appointment.

has met its burden and therefore denies defendant's motion to dismiss the indictment under *Kastigar v. United States, supra.*

In this Opinion the Court also denies defendant's post-trial motion seeking an Order dismissing the indictment under the Court's supervisory powers because the government failed to comply with two Department of Justice policies which appear in The Department of Justice's United States Attorney's Manual. They are: (1) Title 1-11.400 which allegedly requires prior Justice Department approval of prosecutions of immunized witnesses, and (2) Title 9-2.100, et seq., which allegedly requires prior approval of Travel Act prosecutions.

DISCUSSION

1. *The Kastigar Hearing*

The evidence presented at the hearing establishes that the government did not rely in any way upon any of Seregos' immunized testimony in presenting evidence to the grand jury or at trial. After observing their demeanor on the stand, the Court finds the two witnesses testifying at the Kastigar hearing, Assistant United States Attorney ("A.U.S.A.") Richard Mescon and Federal Bureau of Investigation ("FBI") Agent Robert Cassidy, to be highly credible witnesses. Through their testimony the following was established concerning the prosecution of Seregos in the instant case.

In September, 1978, A.U.S.A. Mescon was assigned to the Organized Crime Unit of the United States Attorney's Office. He was assigned to the prosecution of cases arising out of the "Unirac" investigation relating to businessmen on the waterfront. In particular, he was assigned to cases involving alleged payments made to employees of shipping companies (e.g., to port captains) in connection with obtaining business of those companies (Tr. at p. 32).[3] FBI Agent Cassidy was assigned as a case agent in the Seregos matter in 1979.

The case against Seregos developed after persons in the United States Attorney's Office, including A.U.S.A. Mescon, were informed by one Sonny Montella in January, 1979, that

[3] "Tr." refers to the transcript of the Kastigar hearing conducted on July 1 and 2, 1980.

he had made a number of payments to employees of shipping companies and to others in order to obtain the business of those companies (Tr. at p. 32). One of the persons he stated he made a payment to was Edward Pierson. Edward Pierson was eventually debriefed by the United States Attorney's Office and he mentioned the name of Seregos as a person that a case could probably be developed against if the port captains cooperated (Tr. at p. 34). Mescon's real evidence against Seregos for purposes of the indictment against him grew out of the testimony of Richard Weeks, a person whose name was supplied by Pierson (Tr. at p. 9).

In early 1979 Mescon was aware that Seregos was engaged in discussions with the United States Attorney's Office concerning a possible guilty plea to certain charges in return for his testimony as a cooperating witness at the Scotto trial. See Tr. at p. 9. During the spring of 1979, A.U.S.A. Mescon was informed by United States Attorney Robert Fiske, Jr., that the negotiations between the government and Seregos concerning Seregos' cooperation at the Scotto trial had broken down, and that, therefore, Mescon should proceed quickly in obtaining an indictment against Seregos. A.U.S.A. Mescon perceived the immunity problems likely to occur, and took steps to insulate himself from the grand jury proceedings and trial in *United States v. Anthony Scotto*, 79 Cr. 32 (S.D.N.Y.) (Stewart, J.).

Also, in light of his awareness of the potential immunity problems, A.U.S.A. Mescon presented all documents and testimony to the grand jury returning the original indictment against Seregos prior to Seregos' grand jury and trial testimony in the Scotto case. The documents used in obtaining the Seregos indictment came from the following sources: (1) a grand jury subpoena served on Seregos' cooperation (*sic*), Jackson Engineering Co., in January, 1979; (2) the reports made and filed by Agent Cassidy in the investigation conducted by the FBI (the 302's); (3) documents from Richard Weeks, and (4) other documents which had been supplied by a potential trial witness, James Canino. In its presentation of evidence to the grand jury as well as at the trial of Seregos, the government also relied upon the

testimony of Richard Weeks and Edward Pierson, and a transcript of a consensually monitored tape recording of a conversation between Seregos and Montella which was made prior to the spring of 1979 (see Tr. at p. 51 and government's Kastigar hearing exhibits 1 and 3 – the transcript of the Seregos grand jury proceedings).

The documents received from Weeks were marked before the grand jury on April 5, 1979; the materials with respect to Mr. Canino were marked on July 19 and 24, 1979; and the documents received from Mr. Dearie on behalf of Jackson Engineering were marked on July 24, 1980 (Tr. at p. 11).

The indictment against Seregos was voted by the grand jury some time around noon on July 24, 1979 and was filed immediately thereafter (Tr. at pp. 11 and 59). Seregos appeared before the grand jury in the Scotto matter on the afternoon of July 24, 1979, after it had been verified by the AUSA in the Scotto matter that the indictment against Seregos has been filed (see Tr. at p. 60).

A.U.S.A. Mescon did not discuss Seregos' role in the Scotto case with any member of the United States Attorney's Office or any other person except Agent Cassidy who was the FBI agent assigned to prepare the Seregos case for trial. A.U.S.A. Mescon did not attend any portions of the Scotto trial and did not read any newspaper reports of the Scotto trial. He continued this insulation policy up to the conclusion of the Seregos trial (Tr. at p. 19), and up until the conviction of Seregos herein, A.U.S.A. Mescon had no knowledge of the substance of Seregos' grand jury or trial testimony in the Scotto case (Tr. at p. 20), although he may have been aware that it was of an important nature.

Similarly, Agent Cassidy insulated himself from conversations and information concerning post-Seregos-indictment testimony of Seregos. He informed his FBI supervisor, the administrative case agent, and Special Agent Louis Freh and others, that they were not to make him privy to any post-indictment information concerning Seregos (Tr. at p. 89). He did not have any conversations with anyone which revealed the substance

of Seregos' testimony in the Scotto case. He did read a newspaper summary which indicated that Seregos had appeared as a witness in the Scotto trial but the article did not give the substance of the testimony (Tr. at p. 90).

In the continuing effort to insulate themselves from Seregos' immunized testimony, Agent Cassidy, in carrying out A.U.S.A. Mescon's request for a copy of Seregos' earlier Waterfront Commission testimony, obtained the Scotto trial copy directly from the Waterfront Commission and not from the trial judge in the Scotto case who he was informed had a copy under seal (Tr. at p. 101). Similarly, when Seregos broached the topic of payments to Scotto and Anastasia, A.U.S.A. Mescon relied solely upon pre-indictment information which had been obtained by Agent Cassidy in a debriefing of Sonny Montella on June 13, 1978 (Tr. at p. 91).

The superseding indictment filed on February 29, 1980 was merely designed to change the government's legal theory from one based upon the mail fraud statute to one based upon the Travel Act, following a Supreme Court decision in *United States v. Perrin*, 48 U.S.L.W. 4009 (November 27, 1979), which changed the law in this Circuit. In obtaining the superseding indictment, the same evidence was resubmitted to the grand jury (Tr. at p. 17; see also, government's Kastigar hearing Ex. 3 – the transcript of the grand jury minutes for the superseding indictment).

Accordingly, for the reasons stated above, the Court finds that the government has sustained its burden of proving that the evidence presented to the grand jury and to the Court at the time of trial was derived from sources wholly independent of the defendant's immunized testimony. The government presented its evidence to the grand jury prior to Seregos' testimony and A.U.S.A. Mescon and Agent Cassidy went out of their way to successfully avoid learning the "substance" of Seregos' immunized testimony. The government has demonstrated that up until the conclusion of the Seregos trial, the prosecutor and the assigned FBI case agent did not know the "substance" of Seregos' testimony before the Scotto grand and petit juries. Therefore, the motion to dismiss the indictment under *United States v. Kastigar, supra*, is denied.

2. *The alleged violations of Department of Justice policies.*

Defendant alleges that the government has not complied with two Department of Justice policies in obtaining the present indictment against Seregos, and therefore requests that the Court use its supervisory powers to dismiss the indictment. The policy statements at issue here were provided by the government in its memorandum in opposition to defendant's motion. Contrary to defendant's assertions, these policy statements were not violated.

The first policy statement allegedly violated requires prior Justice Department approval of prosecution of immunized witnesses. The government did not violate this policy provision, first, because in contrast to the policy requirement, the instant prosecution was initiated before, not after, the immunized testimony was given; and, secondly, because the crimes charged against Seregos herein are not related to his Scotto testimony, again in contrast to the policy provision restriction.

Still further, the government did not violate the Justice Department policy provision in Title 9-2.100, since, contrary to defendant's assertions, the Travel Act apparently is not one of the statutes included in this policy provision.

Furthermore, even if there was a violation of Department of Justice policy, neither of the alleged violations constitutes grounds for dismissal of the indictment. See *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. Shulman*, 466 F.Supp. 293, 297-301 (S.D.N.Y. 1979). The Department of Justice policies stated in its manual do not create rights, see The Department of Justice United States Attorney's Manual, Title 1-100, "Purpose of the Manual"; nor is there case or statutory law adopting or ratifying the policies at issue here, see *Thompso. v. United States*, 100 S.Ct. 512 (1980) (the "Petite" policy allegedly violated was not only Department of Justice policy, but was policy promulgated in the wake of two Supreme Court decisions).[3]

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[3]See *Petite v. United States*, 361 U.S. 529 (1960) and *Abbate v. United States*, 359 U.S. 197 (1959).

CONCLUSION

Defendant's motions to dismiss the indictment based upon an alleged violation of his Fifth Amendment rights under *United States v. Kastigar, supra,* and because of alleged violations of departmental policies are hereby denied. The judgment of conviction stands. Defendant shall appear for sentencing on September 10, 1980, at 4:30 in the afternoon.

SO ORDERED.

Dated: New York, New York
August 1, 1980

/s/
LAWRENCE W. PIERCE
U.S.D.J.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICHOLAS SEREGOS,
Defendant-Appellant.

S79 Cr. 564

United States District Court,
Southern District of New York.

Filed: August 5, 1980

ORDER

On July 25, 1980, defendant moved for an Order granting him permission to present, through his new counsel, oral argument in connection with his motion filed under *Kastigar v. United States*, 406 U.S. 441 (1972). In addition, he seeks to supplement the record of the evidentiary hearing held in connection with his Kastigar motion.

The Kastigar motion was initially raised in defendant's pre-trial motions and arguments in support of the motion were made in the accompanying memorandum of law. The Kastigar motion was renewed post-trial, and once again a memorandum of law accompanied the motion. During the Kastigar hearing the then attorney for defendant, Raymond Dearie, Esq., was given an opportunity to orally address the Court in support of his motion and a schedule was established for post-hearing submissions. On July 10, 1980, the Court by written order withdrew its request for post-trial submissions; this was done with the belief that the Court already received sufficient submissions, presentations of evidence and arguments to rule on the motion. In its recent motion, defendant has not presented any convincing reason why the Court should act to the contrary. Therefore, the motion for oral argument is hereby denied.

Defendant also seeks to supplement the record of the Kastigar hearing by offering the sealed transcript of his Scotto trial testimony (while at the same time requesting that the Court not read it for fear it will prejudice the Court in imposing sentence) and copies of New York Times articles concerning his Scotto testimony. The Court finds the connection between these items and the government's evidence during the Kastigar hearing to be at best speculative, thus there is no nexus offered for the receipt of these items as an aid to the Court in its determination of the Kastigar motion. Therefore, the Court also denies defendant's request to supplement the record.

SO ORDERED.

Dated: New York, New York
August 1, 1980

/s/

LAWRENCE W. PIERCE
U. S. D. J.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

NICHOLAS SEREGOS,
Defendant-Appellant.

S79 Cr. 564

United States District Court,
Southern District of New York.

Filed: September 15, 1980

ENDORSEMENT ORDER

The defendant moves (1) to have no sentence imposed, (2) to vacate this Court's finding of guilt, and (3) to dismiss the indictment on the ground that his Fifth Amendment due process rights were violated because he was not afforded fair notice that his conduct violated the Travel Act, 18 U.S.C. § 1952.

Federal Rule of Criminal Procedure 12(b)(2) requires that "defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense . . .)" *must* be raised prior to trial. The defendant does not claim that the Court lacks jurisdiction or that the indictment fails to charge an offense. Rather, he claims that his due process rights were violated.

Defendant's failure to raise his objection prior to trial constitutes a waiver. *United States v. Viserto*, 596 F.2d 531, 538 (2d Cir. 1979), *cert. denied*, 100 S.Ct. 80; *United States v. Rodriguez*, 556 F.2d 638, 641 (2d Cir. 1977), *cert. denied*, 434 U.S. 1062. Accordingly, defendant's motion is denied.

SO ORDERED.

Dated: New York, New York
September 11, 1980

/s/

LAWRENCE W. PIERCE
U. S. D. J.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

NICHOLAS SEREGOS,
Defendant-Appellant.

S79 Cr. 564

United States District Court,
Southern District of New York

Filed: October 17, 1980

ORDER

On April 2, 1980, the defendant, Nicholas Seregos, was found guilty by this Court on each of two counts charged in an indictment bearing number S79 Cr. 564. Count One charges a conspiracy, in violation of 18 U.S.C. § 371, to violate the Travel Act, 18 U.S.C. § 1952. Count Two charges a substantive violation of the Travel Act. The predicate state law offense underlying both counts is commercial bribery in violation of N.Y. PENAL LAW §§180.03 and 180.08. The first count charges a conspiracy between May 1973 and May 1977; the overt acts averring the defendant's participation refer to dates ranging from October 18, 1976 to December 1976.

On July 16, 1976, the Second Circuit held that the Travel Act did not apply to acts of commercial bribery in violation of the New York Penal Law. *United States v. Brecht*, 540 F.2d 45 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977). On November 27, 1979, the Supreme Court of the United States held that the Travel Act did apply to acts of commercial bribery and in effect overruled the decision of the Second Circuit in *Brecht*. *Perrin v. United States*, 444 U.S. 37 (1979). The superseding indictment upon which Seregos was found guilty was returned following the decision in *Perrin*.

By notice of motion filed September 8, 1980, four days prior to the defendant's scheduled sentencing, the defendant moved (1) to have no sentence imposed, (2) to vacate this Court's finding of guilt, and (3) to dismiss the indictment on the ground that his Fifth Amendment due process rights were violated because he was not afforded fair notice that his conduct violated the Travel Act.

By endorsement order dated September 11, 1980, the Court denied the defendant's motion. After receiving the defendant's reply papers, the Court granted the defendant's motion for reconsideration made on September 12, 1980. On September 12, 1980, the defendant was fined $5,000 on each of the two counts of the indictment. Execution of the sentence was stayed pending resolution of the present motion.

Federal Rule of Criminal Procedure 12(b)(2) requires that "defenses and objections based on defects in the indictment or information (other than [failure] to show jurisdiction in the court or to charge an offense. . .)" must be raised prior to trial. Failure to do so constitutes a waiver.

The defendant does not claim that the Court lacks jurisdiction or that the indictment fails to charge an offense. Rather, he claims that his due process rights were violated.

Although neither Rule 12 nor the Advisory Committee notes make explicit reference to a due process claim of insufficient notice, the Court finds that such an objection is of the type that must be raised prior to trial. Indeed, several motions were made on defendant's behalf before trial commenced. Despite his contentions to the contrary, the defendant knew or could have known prior to trial that his then alleged illegal conduct occurred at a time when *Brecht* was the prevailing law in this jurisdiction.[1] Thus, he could have raised an objection based on a denial of fair notice prior to trial. His failure to do

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[1] *Brecht* was the law of this Circuit from June (*sic*) 16, 1976 until November 27, 1979. All of the overt acts charged in Count One and the substantive offense charged in Count Two occurred during this period. The defendant could certainly have timely moved, on the due process grounds now asserted, to dismiss the portions of the indictment relating to events that occurred when *Brecht* was the rule.

so constituted a waiver. Accordingly, the defendant's motion is denied.

The defendant's sentence shall be executed, within twenty days of the entry of this Order, pursuant to this Court's sentencing order dated September 12, 1980.

SO ORDERED.

Dated: New York, New York
October 15, 1980

/s/
LAWRENCE W. PIERCE
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Filed: July 28, 1981
A. Daniel Fusaro, *Clerk*

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of July, one thousand nine hundred and eighty-one.

Present:
HON. WILFRED FEINBERG, Chief Judge
HON. JAMES L. OAKES, Circuit Judge
HON. EDWARD R. NEAHER, District Judge

Circuit *Judges*,

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v. #80-1403

NICHOLAS SEREGOS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk*
by Edward J. Guardaro, *Deputy Clerk*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed: Sept. 14, 1981
A. Daniel Fusaro, *Clerk*

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of September, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v- No. 80-1403

NICHOLAS SEREGOS,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Nicholas Seregos,

Upon consideration by the panel that heard the appeal it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, *Clerk*

/s/_____
FRANCIS X. GINDHART
Chief Deputy Clerk

STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Travel Act, 18 U.S.C. § 1952, provides:

Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to –

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United

States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. § 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisonment not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 6001 provides:

Definitions.

As used in this part –

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under

48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, a United States bankruptcy court established under chapter 6, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Court of International Trade, and the Court of Military Appeals.

18 U.S.C. § 6002 provides:

Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to –

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the

basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003 provides:

Court and grand jury proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment –

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

N.Y. Penal Law § 180.03 (McKinney's Supp. 1979-80) provides:

Commercial bribing in the first degree.

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars.

Commercial bribing in the first degree is a class A misdemeanor.

N.Y. Penal Law § 180.08 (McKinney's Supp. 1979-80) provides:

Commercial bribe receiving in the first degree.

An employee, agent or fiduciary is guilty of commercial bribe receiving in the first degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceeds one thousand dollars.

Commercial bribe receiving in the first degree is a class A misdemeanor.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-895

In the Supreme Court of the United States

OCTOBER TERM, 1981

NICHOLAS SEREGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

FRANK J. MARINE
Attorney
Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the indictment should be dismissed on the ground that improper use was made of petitioner's immunized testimony.

2. Whether petitioner's conviction for a violation of the Travel Act, 18 U.S.C. 1952, based on conduct that occurred before this Court's decision in *Perrin* v. *United States*, 444 U.S. 37 (1979), violates the Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-895

NICHOLAS SEREGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 655 F.2d 33. The opinion of the district court (Pet. App. A18-A25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1981. A petition for rehearing was denied on September 14, 1981. The petition for a writ of certiorari was filed on November 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of traveling interstate to facilitate the payment of a commercial bribe, in violation of the Travel Act, 18 U.S.C. 1952 and 2, and of conspiring to violate the Travel Act, in violation of 18 U.S.C. 371. Petitioner was sentenced to a $5,000 fine on each count. The court of appeals affirmed (Pet. App. A1-A10).

1. The evidence at trial established that in December 1976 petitioner traveled from New Jersey to New York to facilitate the payment of an $18,000 commercial bribe by Richard Weeks, president of Weeks Stevedoring Co., to Edward Pierson. Pierson testified that in May 1973 he leased from Weeks Stevedoring Co. on behalf of Moore-McCormack Lines, where he was serving as an assistant vice-president, a floating crane for $15,500 per month; this price included a $1,500 a month kickback to Pierson (Tr. 39-40, 648).[1] Weeks had difficulty raising the cash to make the kickback payments, so the payments were generally made by check from a third party payable to Gerald Coleman, a friend of Pierson's (Tr. 44-45). In 1976, when Weeks had fallen behind on these payments, Pierson solicited the assistance of William Montella, who was also making payments to him, in finding a way to raise cash for Weeks by submitting a false invoice. Montella suggested that petitioner, the president of Jackson Engineering Co., might be able to provide the invoice (Tr. 50). See Pet. App. A3, A16.

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[1] "Tr." refers to the trial transcript; "H. Tr." refers to the separate transcript of the post-trial *Kastigar* hearing; "GX" refers to government exhibits introduced at trial; "H. GX" refers to the government's hearing exhibits; "App." refers to the appendix on appeal.

In August or September 1976, petitioner called Pierson, and the two men met at Pierson's office in Brooklyn. At the meeting, Pierson told petitioner that "we were leasing a crane from Weeks Stevedoring, and that in addition to that I had a private arrangement with Mr. Weeks, and I needed an invoice because he had to pay me some money" (Tr. 54). Pierson asked petitioner if he could prepare an invoice for repairs to the crane Moore-McCormack was renting. Petitioner said that he thought that he could, and, after examining the crane, returned to Pierson's office and said he would have no problem writing up the invoice. Petitioner also said he would have to keep some money because of the requirement that he pay taxes on the money he received from the invoice (Tr. 56). Subsequently, petitioner gave Pierson an invoice in an amount between $30,000 and $35,000, and Pierson showed the invoice to Richard Weeks. Weeks rejected the invoice as being too high (Tr. 57-58). Pierson again met with petitioner and obtained a revised invoice in the amount of $25,795 (Tr. 59-60; GX 1). Pierson then gave the revised invoice to Weeks (Tr. 61). The repairs referred to in the invoice were never performed. See Pet. App. A4, A16.

Pierson then testified that, sometime between late November and mid-December, he received a call from petitioner and arranged to meet him at Ponte's restaurant. Petitioner and Pierson met at the bar in Ponte's; Montella was not present. Petitioner told Pierson that he had an envelope with $18,000 in it for him, and that the difference between the $18,000 and $25,795 was for taxes. The two men then went to the men's room, where petitioner passed Pierson an envelope that contained about $18,000 (Tr. 62-64).

Richard Weeks testified and corroborated Pierson's story. He explained that Pierson had told him in connection with the crane negotiations "that it was customary over there to pay him a certain amount of money, which approximated ten percent of the contract" (Tr. 319). Accordingly, the $1,500 per month was added to the contract price. Because of the difficulty he had generating cash, Weeks paid Pierson sporadically and was often in arrears on the payments (Tr. 323). He further testified that in 1976 Pierson suggested the submission of a phony bill for repairs to the crane. Weeks ultimately agreed, and Pierson gave him an invoice from Jackson Engineering. Weeks rejected the first invoice because it described repair work that could not be done on the crane. Later, Pierson gave Weeks a second invoice (Tr. 327-329; GX 1). Weeks approved the invoice and, on December 2, 1976, wrote a check and gave it to a representative of Jackson Engineering (Tr. 331-333; GX 2).[3]

2. Prior to trial, petitioner moved to dismiss the indictment on the ground that his prior immunized testimony before a grand jury and in the related Scotto trial, in which he had testified about the facts underlying the indictment against him, fatally tainted the government's prosecution under the principles of *Kastigar* v. *United States*, 406 U.S. 441 (1972). The district court denied the motion, finding that the in-

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[3] Petitioner also testified at trial. He denied any knowledge of the illicit arrangement between Weeks and Pierson. He admitted preparing the false invoice and obtaining the $18,000 in cash, but claimed that he did this as an accommodation for Montella, without knowing the purpose, and that he gave the $18,000 in cash to Montella, not Pierson (Pet. App. A4).

itial indictment was filed before petitioner gave any immunized testimony; he then scheduled a post-trial *Kastigar* hearing to determine whether the government's trial evidence was tainted (Pet. App. A11-A12).

After petitioner was convicted, Richard Mescon, the Assistant United States Attorney who conducted the grand jury investigation and petitioner's trial, and FBI Agent Robert Cassidy, the case agent on petitioner's case, testified for the government at the *Kastigar* hearing. Mescon testified that the investigation of petitioner and others thought to be involved in unlawful activity by businessmen on the waterfront was assigned to him in January 1979. He subsequently developed both Pierson and Weeks as witnesses; they pled guilty to criminal informations on April 5, 1979, and May 10, 1979, respectively (H. Tr. 8-9). Petitioner, through his counsel, was simultaneously engaged in periodic negotiations with United States Attorney Robert Fiske and Assistant United States Attorney Alan Levine concerning his role as a prospective witness in the Scotto trial. When these negotiations broke down, Fiske instructed Mescon to proceed with the indictment of petitioner (H. Tr. 10). The indictment was returned on July 24, 1979, and petitioner first gave immunized testimony later that day before the grand jury investigating Scotto (Pet. App. A22).

Mescon testified that he took special precautions to protect the integrity of petitioner's prosecution from any claim of taint due to immunized testimony. He brought before the grand jury all of the evidence then in his possession relating to the facts underlying

the indictment (H. Tr. 10-12; H. GX 1).[3] He did not read petitioner's grand jury or trial testimony, nor did he discuss petitioner's involvement in the case with any person other than Agent Cassidy. He did not attend any portions of the Scotto trial at which petitioner testified, and he did not read any newspaper accounts of that trial. Up to the conclusion of petitioner's trial in April 1980, he had no knowledge of the substance of petitioner's testimony before the grand jury or at the Scotto trial (H. Tr. 17-20).

Mescon further testified that, in addition to the testimony of Pierson and Weeks, the government's direct case at trial consisted exclusively of documents subpoenaed from Weeks Stevedoring and Jackson Engineering prior to the indictment of petitioner (H. Tr. 20-21). Mescon also explained the independent sources of topics and documents he used during the cross-examination of petitioner. Information concerning payoffs petitioner made to Scotto and Anastasio was provided Mescon by Agent Cassidy in the form of Cassidy's notes of his debriefing of Montella in June 1978, a tape recording of a consensually monitored conversation between Montella and petitioner in August 1978, and certain "302 reports" by FBI agents made in 1977 (H. Tr. 26-27). Mescon explained that he also learned from Agent Cassidy, based on certain conversations overheard before petitioner gave his im-

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[3] The superseding indictment on which petitioner went to trial was voted by a different grand jury but was based on the same evidence that had been presented to the first grand jury (H. Tr. 16-17; H. GX 3).

This procedure of presenting all of the available evidence to the grand jury served the purpose of certifying the government's evidence prior to immunizing the defendant. See *Goldberg* v. *United States*, 472 F.2d 513, 516 n.5 (2d Cir. 1973).

munized testimony, that petitioner had testified before the Waterfront Commission in 1976. The actual transcript of petitioner's testimony obtained from the Waterfront Commission supplied the basis for the cross-examination on this subject (H. Tr. 21-23).

Mescon described a meeting in early March 1980 that he had with Fiske, Levine, and Raymond Dearie, petitioner's counsel, during which Dearie requested that the government drop the indictment against petitioner or offer him an opportunity to plead guilty to a misdemeanor charge, which had been offered to him during the earlier negotiations before the Scotto trial. After the meeting, Mescon and Fiske decided to proceed with trial and not renew the misdemeanor offer (H. Tr. 70-72). Mescon testified that he did "not precisely" recall telling Dearie the reasons for the decision, but that "[t]he basic reason was that having made an offer for the misdemeanor disposition at one time, and having had that offer refused at the time * * * it was appropriate for us not to let the person have the benefit of the bargain without having done his share" (H. Tr. 73).

With respect to his cross-examination of petitioner concerning his payments to employees of Hellenic Lines, Mescon stated that his "first knowledge of that information was when [petitioner] told me during his cross-examination" (H. Tr. 79). He also stated that, while Mescon and Cassidy were preparing for the cross-examination, Cassidy suggested that the subject of payments to Hellenic Lines and other companies might be a fruitful area (H. Tr. 80, 118). Mescon also testified that the decision not to call Montella as a rebuttal witness was his alone (H. Tr. 130), although he did consult with Fiske, Levine, and others before making the decision, which turned on one pri-

mary consideration—whether problems could arise in the event there were inconsistencies between Montella's testimony in this case and his testimony in the related Scotto and Clemente trials (H. Tr. 125-130).

FBI Agent Robert Cassidy testified that he had worked on the waterfront investigation for four and a half years. Cassidy testified that when petitioner was indicted in July 1979, both Mescon and Fiske instructed him to insulate himself from conversations pertaining to any post-indictment testimony of petitioner. To that end, Cassidy spoke with his supervisor and other agents working on the investigation, telling them not to reveal to him any information relating to petitioner's immunized testimony (H. Tr. 89). Prior to the verdict in petitioner's case, Cassidy never read petitioner's grand jury or trial testimony, never spoke to any FBI Agent, Assistant U.S. Attorney, or any other person concerning the substance of that testimony, and, except for a single summary article, which stated only that petitioner was a witness at the Scotto trial, never read anything in the newspaper about that testimony (H. Tr. 89-90). Cassidy further testified that he learned of petitioner's payments to Anastasia on June 13, 1978, during his debriefing of Montella (H. Tr. 91) and that he learned that petitioner had testified before the Waterfront Commission from the August 1978 taped conversations between Montella and petitioner (H. Tr. 96).

Petitioner presented no witnesses at the hearing. It was stipulated that, if called as a witness, Dearie would testify that one of the reasons given at the meeting with Fiske, Levine and Mescon for declining to offer a misdemeanor disposition was "the information that [petitioner] had revealed while under his grant of immunity" (H. Tr. 139). Dearie also would

have stated that Mescon later identified this as the principal one of many reasons for declining to offer an opportunity to plead guilty to a misdemeanor (*ibid.*). Mescon, however, testified that he did not recall making this statement; moreover, while he did not specifically recall not making the statement, the basic reason for the decision was that petitioner had failed to perform his part of the bargain that had been the predicate for the original misdemeanor offer (H. Tr. 73-74).

3. On August 1, 1980, the district court issued an opinion concluding that "the government has sustained its burden of proving that the evidence presented to the grand jury and to the Court at the time of trial was derived from sources wholly independent of [petitioner's] immunized testimony" (Pet. App. A23). Finding Mescon and Cassidy to be "highly credible witnesses" (*id.* at A20), the court rejected petitioner's claim of taint and denied his motion to dismiss the indictment. On appeal, the court of appeals affirmed, stating that "[f]rom our independent review of [the] record we see no reason to question Judge Pierce's findings" (*id.* at A10). The court also rejected petitioner's contention that he did not have fair notice that his conduct violated the Travel Act (*id.* at A5-A7).

ARGUMENT

1. Petitioner contends (Pet. 10-13) that the government improperly used his immunized grand jury testimony, in violation of the principles enunciated in *Kastigar* v. *United States*, 406 U.S. 441 (1972). Specifically, while petitioner does not dispute that the evidence introduced at trial was obtained without use of the immunized testimony, he contends (Pet. 11-12) that the United States Attorney refused

to agree to a more lenient disposition of the charges because of admissions made in petitioner's immunized testimony, that the trial prosecutor planned trial strategy in consultation with other government attorneys who had been exposed to petitioner's immunized testimony, and that the idea of cross-examining petitioner at trial about two subjects—his payments to Hellenic Lines employees and his false testimony before the Waterfront Commission—was suggested by his immunized testimony. These contentions do not merit review by this Court.

The government has the burden of proving by a preponderance of the evidence (see *Lego* v. *Twomey*, 404 U.S. 477, 487-489 (1972)) that "the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled [immunized] testimony." *Kastigar* v. *United States*, *supra*, 406 U.S. at 460. Based on the testimony offered by the government's witnesses at the post-trial *Kastigar* hearing, the district court found that the government met this burden. The district court's findings here that there was no improper use of petitioner's immunized testimony are supported by the record, and its ruling was affirmed by the court of appeals. Further review of this factbound issue is therefore unwarranted.

Petitioner's first claim of taint rests upon the participation of Fiske and Levine in the denial of petitioner's eve of trial request for a misdemeanor disposition and the statement of petitioner's trial attorney that he had been told that the request was denied because of petitioner's immunized testimony. However, Mescon testified that he did not recall that this was the basis for the denial of petitioner's request. Rather, Mescon testified that "the basic rea-

son" for not agreeing to a misdemeanor disposition was that petitioner had rejected a similar proposal previously, and the prosecutors did not consider it appropriate to let petitioner "have the benefit of the bargain without having done his share" (H. Tr. 73). While the district court made no specific finding on this point, it found that Mescon was a "highly credible" witness (Pet. App. A20), and thus the record supports the conclusion that the decision to deny petitioner's request was not tainted by information gleaned from his immunized testimony.

In any event, petitioner would not be entitled to relief even if his immunized testimony had somehow influenced the decision not to permit petitioner to plead guilty to misdemeanor charges. Such reference to immunized testimony does not involve the impermissible use of immunized testimony or any of its fruits against a defendant. A defendant has no right to plead guilty to reduced charges or to require the government to engage in plea bargaining. *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). The fact that the government did not offer petitioner a benefit to which he had no entitlement would not be an impermissible "use" of his immunized testimony against him. See *United States* v. *Apfelbaum*, 445 U.S. 115, 124-125 (1980).[4]

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[4] Petitioner's reliance (Pet. 10-12) upon dictum to the contrary in *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), is misplaced. In *McDaniel*, the federal prosecutor, unaware that the testimony was immunized, read the three volumes of the defendant's state grand jury testimony prior to presenting the case against the defendant to a federal grand jury. The court held that, under these circumstances, it could not conclude that the prosecutor had not made some use of the immunized testimony. In listing possible uses, the court noted that a refusal to plea bargain was one area in which im-

In addition, petitioner's trial counsel knew that Fiske and Levine had prosecuted the Scotto case and therefore that they were familiar with petitioner's immunized testimony. Yet, on his own initiative, petitioner requested a meeting with Fiske on the eve of trial to take his "last crack at the U.S. Attorney's Office" (see H. Tr. 71-72, 137). Thus, if the decision not to offer petitioner an opportunity to plead guilty to a misdemeanor charge was somehow affected by Fiske's knowledge of the immunized testimony, that result was directly caused by petitioner's request for and participation in a meeting with Fiske and Levine, and petitioner has no grounds now to complain of their participation.

Petitioner also objects (Pet. 12) that two "trial strategy" decisions were made "in consultation with" Fiske and Levine. The first of these is the government's decision to request a postponement of petitioner's trial until after the trial of the Scotto case. The record clearly establishes, however, that the decision to request the adjournment was made by Mescon, who discussed the matter with Fiske and Levine only *after* his decision had been made (H. Tr. 132). In any event, petitioner does not suggest how he was prejudiced by this decision or how knowledge of his immunized testimony could have affected it.

The second decision referred to by petitioner is the decision at the close of the trial not to call Montella as a rebuttal witness to contradict parts of petitioner's testimony. While Mescon testified that that

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munized testimony could inadvertently be used. The court did not hold that a refusal to plea bargain in the circumstances presented here would amount to a *Kastigar* violation. Moreover, the broad language used by the Eighth Circuit in its dictum does not accord with this Court's later explanation in *Apfelbaum*, *supra*, of the scope of use immunity.

decision was his alone (H. Tr. 130), he did consult with Fiske, Levine, and others who may have been familiar with the immunized testimony. But the record makes clear that the only consideration in deciding whether to call Montella was the possibility that, under cross-examination, he would testify inconsistently with his testimony at other trials, thus opening the door to possible requests for post-trial relief in those *other* prosecutions (H. Tr. 125-130). Thus, there is no basis for speculating that petitioner's immunized testimony, which was totally irrelevant to this consideration, had any bearing on the decision not to call Montella. Moreover, petitioner suffered no harm from the government's decision not to call Montella, who had already testified in other trials contrary to crucial elements of petitioner's testimony (see Tr. 22). Indeed, petitioner himself was free to call Montella if he believed his testimony would be of benefit (see Tr. 724).

Petitioner also contends that the government failed to establish a basis independent of the immunized testimony for two separate topics of cross-examination. This claim is belied by the record. With respect to the question concerning payments to Hellenic Lines, Mescon testified at the hearing that he did not learn of these payments until he heard petitioner's admissions during cross-examination (H. Tr. 79).[5] Indeed, because neither Mescon nor Cassidy

[5] The record shows that the natural development of the cross-examination led directly to the challenged inquiry. Thus, petitioner first testified that from 1974-1978, he generated $12,000 in cash per month (Tr. 535-536). He was then asked about his payments to Anastasio, which petitioner freely admitted (Tr. 545). Petitioner was then asked if he made payments for any other company's business and answered that there was one other company. Then the prosecutor asked if

was aware of the substance of petitioner's immunized testimony (H. Tr. 17-20, 89-90), there is no ground for conjecturing that that testimony was the source of this question. Similarly, both Cassidy and Mescon testified that Cassidy learned of the Waterfront Commission testimony from tape recordings of petitioner (H. Tr. 21-23, 96). In sum, there is no basis for disturbing the findings of the two courts below that the prosecution did not use petitioner's immunized testimony or any evidence derived from it.

2. Petitioner also contends (Pet. 13-17) that his conviction violates the Due Process Clause because he did not receive fair notice that his participation in an illegal commercial bribery scheme violated the Travel Act, 18 U.S.C. 1952. This contention is without merit.

Clearly, the constitutional prohibition against *ex post facto* laws, Article I, Section 10, has no application here. The Travel Act was enacted in 1961 and thus was in force for many years before petitioner committed the crimes for which he was convicted. Similarly, the underlying state statute that petitioner violated, N.Y. Penal Law §§ 180.03, 180.08 (McKinney's Supp. 1979-1980), and its essentially identical predecessor, had prohibited the conduct at issue for many years before petitioner committed the acts that gave rise to this indictment.[6] The Due Process

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this remaining company was Hellenic Lines, a logical question in light of that company's status as Jackson's primary customer (Tr. 554-555).

[6] The present version of N.Y. Penal Law §§ 180.03 and 180.08 became effective on September 1, 1976. But the only changes in the prior law effected by the 1976 amendment were subdivision of the crime into different degrees depending upon the amount of money in question, and enhancement of the penalty for the greater offense.

Clause, however, also requires that a criminal statute afford fair notice of what conduct is deemed criminal because "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Here, however, there can be no doubt that petitioner had fair notice that his conduct was proscribed.

Petitioner does not dispute that the state commercial bribery statute unambiguously proscribes his conduct.[7] Thus, petitioner clearly had fair notice that his conduct was criminal, in violation of the statute listed in the indictment as the predicate for the Travel Act offense. By the same token, the Travel Act, by its express terms, plainly covers com-

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[7] The indictment listed two New York statutes as predicate state offenses. N.Y. Penal Law § 180.03 (McKinney's Supp. 1979-1980) provides:

> A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars.

N.Y. Penal Law § 180.08 (McKinney's Supp. 1979-1980) provides:

> An employee, agent or fiduciary is guilty of commercial bribe receiving in the first degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceeds one thousand dollars.

mercial bribery under state law. See *Perrin* v. *United States*, 444 U.S. 37 (1979).*

Petitioner contends, however, that he had no fair notice that his conduct violated the Travel Act because it occurred before this Court's decision in *Perrin*, and at a time when the Second Circuit erroneously had held in *United States* v. *Brecht*, 540 F.2d 45 (1976), cert. denied, 429 U.S. 1123 (1977),* that the Travel Act did not extend to commercial bribery. But a defendant who commits what is concededly a crime, in violation of a statute in effect at the time of the commission of the crime, may not escape liability simply because of the existence of an erroneous lower court decision construing that statute. The Due Process Clause plainly is not violated in such a situation unless the defendant shows that he actually relied in good faith on the erroneous precedent. *United States* v. *Polizzi*, 493 F.2d 570,

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* The Travel Act, 18 U.S.C. 1952, provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce, * * * with intent to—
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> * * * * *
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> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, * * * [shall be guilty of a crime]
>
> * * * * *
>
> (b) As used in this section, "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* The petition for certiorari (No. 76-5645) was filed by Brecht and addressed questions related only to his conviction under the Hobbs Act because Brecht, of course, had no basis to raise the issue of the correctness of the court of appeals' holding limiting the reach of the Travel Act.

573 (3d Cir. 1974); *United States* v. *Mercado*, 478 F.2d 1108, 1111 (2d Cir. 1973). See also *James* v. *United States*, 366 U.S. 213, 241 (1961) (opinion of Clark, J.); *id.* at 245-247 (opinion of Harlan, J.).[10] Petitioner does not allege that he placed any reliance on, or was even aware of, the *Brecht* decision. Hence, the existence of that decision provides no basis for allowing him to escape liability for his criminal conduct.[11]

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[10] The disagreement between the opinion of Chief Justice Warren announcing the Court's judgment in *James* (see 366 U.S. at 221) and the opinions of Justices Clark and Harlan concerned the propriety of a factual finding of willfulness when the defendant had failed to report as income receipts that the Court had previously held did not constitute income, in the absence of evidence of actual reliance by the defendant upon the Court's prior decision. The judgment of the Court in *James* does not dispose of this issue. Even if it had disposed of it in the manner most favorable to petitioner's present contention, it would not support his position. Apart from the fact that *James* involved the overruling of a prior statutory construction by this Court, the present case involves not the element of willfulness that was the focus of disagreement in *James*, but rather simply the satisfaction of a jurisdictional element converting what was already a state offense into a federal one. There is no requirement in the Travel Act that the interstate travel in furtherance of a covered state offense be done willfully. See Pet. App. A7 n.3; *United States* v. *Perrin*, 580 F.2d 730, 737 (5th Cir. 1978), aff'd, 444 U.S. 37 (1979). Cf. *United States* v. *Feola*, 420 U.S. 671, 685 (1975).

[11] Moreover, to the extent petitioner's contention rests upon the claim that he is to be presumed to have had notice of the decision in *Brecht*, we think it must equally be presumed that he had notice of the Second Circuit's decision in *Mercado*, *supra*, demonstrating that he could not rely upon presumptive—as opposed to actual—notice of a decision of that court erroneously construing a statute as inapplicable to certain conduct.

As petitioner notes (Pet. 10, 15), in *United States* v. *Goodheim*, 651 F.2d 1294, rehearing denied, 664 F.2d 754 (1981), the Ninth Circuit has recently taken a position at odds with the above line of authority. There, the court reversed the defendant's convictions on several gun control charges, remanding for a hearing to determine whether there was a constitutional defect in the proceedings underlying the predicate conviction, because Ninth Circuit law at the time of the offenses was that such a constitutional defect was a defense to gun control charges—a view rejected by this Court in *Lewis* v. *United States*, 445 U.S. 55 (1980). While we believe that *Goodheim* was erroneously decided,[12] the decision does not conflict with the instant case. Even under the standard applied by the Ninth Circuit in *Goodheim*, petitioner's conviction must stand. In denying the government's petition for rehearing, the *Goodheim* court explained that the fundamental principle underlying its decision is that "[w]here the clear, settled law of this circuit precludes notice that conduct is criminal, due process does not permit a criminal conviction for that conduct." 664 F.2d at 756. That principle obviously has no application here where, whatever the interpretation of the Travel Act, petitioner undisputedly was on notice that his conduct was criminal—in violation of the New York commercial bribery statute.[13]

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[12] The Solicitor General has determined not to file a petition for certiorari in *Goodheim*.

[13] It is of course possible that the Ninth Circuit would in the future expand on its holding in *Goodheim* to embrace petitioner's claim that a defendant must have fair notice from lower court decisions not only that his conduct is criminal, but also that it violates the particular statute under which

Similarly, petitioner's reliance (Pet. 14-15) on *Marks* v. *United States*, 430 U.S. 188 (1977), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), is misplaced. In *Bouie*, a case involving the judicial expansion of a state trespass statute to cover a civil rights demonstrator's refusal to leave a restaurant, this Court stated that a "deprivation of the right of fair warning can result not only from vague statutory language but also from an *unforeseeable* and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. at 352 (emphasis added). The Court concluded that "[i]f a judicial construction of a criminal statute is '*unexpected* and *indefensible* by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Id.* at 354, quoting J. Hall, *General Principles of Criminal Law* 61 (2d ed. 1960) (emphasis added). In *Marks*, the Court applied *Bouie* in holding that its decision in *Miller* v. *California*, 413 U.S. 15 (1973), which expanded criminal liability for obscenity beyond the limit demarcated by a prior Supreme Court precedent, could not be applied retroactively to impose criminal liability for conduct that was not criminal under prior precedent.

In contrast, this Court's ruling that the Travel Act's proscription of bribery under state law covers commercial bribery was neither unforeseeable nor an expansion of the Travel Act's scope. As a unanimous Court stated in *Perrin* v. *United States*, *supra*, 444 U.S. at 45, when the Travel Act was enacted

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the defendant is charged. Since Goodheim's conduct apparently was criminal only under the federal firearm laws, the court of appeals had no occasion to consider or decide the point. Thus it remains unclear how the Ninth Circuit would rule on a case such as petitioner's, and there is no intercircuit conflict to be resolved here.

"the common understanding and meaning of 'bribery' had extended beyond its early common-law definitions" and encompassed commercial bribery. Moreover, even prior to the *Brecht* decision, the Fourth Circuit had held that the Travel Act covered commercial bribery as defined by New York's commercial bribery statute. *United States* v. *Pomponio*, 511 F.2d 953, cert. denied, 423 U.S. 874 (1975). Therefore, it was readily foreseeable at the time of petitioner's criminal conduct that his conduct violated the Travel Act. See *United States* v. *Mercado*, *supra*, 478 F.2d at 1111. In contrast to *Marks*, where the conduct proscribed by the statute could be understood only by reference to this Court's constitutional decisions regarding "obscenity" (see 430 U.S. at 195), and *Bouie* where "conduct clearly outside the scope of the statute as written [was] retroactively brought within it by an act of judicial construction" (378 U.S. at 352), petitioner's conduct here violated the plain language of a specific criminal statute.

Moreover, even assuming arguendo that petitioner could not have foreseen that his conduct would be held to violate the Travel Act, it stands ordinary notions of fairness on their head to suggest that due process requires the reversal of his conviction in the circumstances of this case. The only element of the Travel Act offense that is not an element of the predicate state commercial bribery offense is the requirement of interstate travel. While it was, of course, essential for the government to prove such travel, the statute does not require that petitioner have any particular mental state concerning that travel or any knowledge that his crime became a federal one because of that travel. See note 10, *supra*. Thus, whether or not, as a matter of abstract theory, petitioner had full notice of the relevance of his inter-

state travel, he did have notice of the criminality of the actions that underlay his conviction.[14]

Finally, whatever the theoretical merits of petitioner's contentions, his case is fatally flawed in another respect. The offense of which petitioner was convicted was his travel from New Jersey to New York in furtherance of unlawful bribery activity. While this offense was completed in New York, which is within the Second Circuit, it was begun in New Jersey, which is within the Third Circuit. As is clear from 18 U.S.C. 3237, petitioner could as readily have been prosecuted in New Jersey as in New York.[15] The Third Circuit, however, had never passed upon the issue presented in *Brecht* and *Perrin*, and it would not have been bound by the Second Circuit's erroneously narrow construction of the Travel Act. Thus, if it was fair for this Court to uphold Perrin's conviction, as it did unanimously, it cannot violate petitioner's due process rights to uphold his conviction for an offense partly committed within the Third Circuit.

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[14] Indeed, petitioner's own efforts to conceal his conduct make plain that he was well aware that his conduct was unlawful. Though he was president of his company, he prepared the phony invoice for Weeks himself, and he gave the $18,000 in cash to Pierson in the men's room of a restaurant.

[15] The defendant in *Pomponio*, *supra*, was prosecuted in the Eastern District of Virginia for interstate travel in furtherance of an unlawful commercial bribery violating the same New York statute as is involved here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NICHOLAS SEREGOS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. The Government's argument in favor of the retroactive application of an expanded construction of the Travel Act (18 U.S.C. § 1952) to conduct previously immune under it rests, as the Government concedes, on an analysis which the Court of Appeals for the Ninth Circuit has twice rejected on the grounds that it "would not only violate constitutional principles, but would undermine the integrity of our federal appellate system." *United States* v. *Goodheim,* 651 F.2d 1294, *rehearing denied,* 664 F.2d 754 (1981). Despite the Government's failure to seek rehearing *en banc* in *Goodheim,* a member of the Court considered the retroactivity issue so difficult and important that he requested that the Court be polled and dissented from

its determination not to consider the case *en banc*. *Id.* at 756. In the face of its loss in the Ninth Circuit, and grudgingly conceding at least a burgeoning conflict between *Goodheim* and this case (Brief for the United States at 18 & n.13), the Government nevertheless announces that it will not seek certiorari in *Goodheim* and urges the Court to avoid an issue of obvious current importance both to the judicial process and to the administration of criminal justice.*

Relying on the concurring and dissenting opinions of Justices Harlan and Clark in *James* v. *United States*, 366 U.S. 213 (1961), and two lower court decisions** which attempt to derive a rule from the five different opinions announced in *James*, the Government claims that, to bar retroactive application of *Perrin* v. *United States*, 444 U.S. 37 (1979), in this case, the petitioner had to show that he actually relied in good faith on the contrary decision in *United States* v. *Brecht*, 540 F.2d 45 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977). This argument, emphatically rejected in *Goodheim* on rehearing, 664 F.2d 754, and not even raised in the Second Circuit in this case, has no merit. Whatever the vitality at the time of the ill-defined requirement of actual reliance conjured by *Polizzi* and *Mercado* from the conflicting opinions in *James*, it does not survive the Court's subsequent elaboration of the Due Process protection against retroactive application of expansive judicial interpretations of criminal statutes in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Marks* v. *United States*, 430 U.S. 188 (1977).

In *Marks*, the most recent treatment of this issue, there was no claim that the petitioner had relied on the Court's earlier

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* The retroactivity issue presented by this case and *Goodheim* has striking parallels in other areas of the law. *E.g.*, *Marino* v. *Lowers*, 657 F.2d 1363 (3d Cir. 1981) (*en banc*). We do not suggest, of course, that the resolution of that issue in those contexts turns on the same constitutional considerations presented in a federal criminal prosecution.

** *United States* v. *Polizzi*, 493 F.2d 570 (3d Cir. 1974); *United States* v. *Mercado*, 478 F.2d 1108 (2d Cir. 1973).

restrictive interpretation of the federal obscenity statute, nor any requirement announced by a unanimous Court that more need be shown to trigger the protection of the Due Process Clause than that the Court's broader re-definition of obscenity had expanded the scope of the statute to reach conduct to which it had not previously applied. 430 U.S. at 194, 196. Similarly, no showing of reliance was required in *Bouie*.

The second principal defect in the Government's argument is its claim that the prohibitions of the New York commercial bribery statute authorize the retroactive application of the expansive reading of the Travel Act in *Perrin* to petitioner's conduct, which occurred when the Second Circuit's contrary decision in *Brecht* stated the applicable law.

First, in an effort to distinguish *Goodheim*, the Government claims that "Goodheim's conduct apparently was criminal only under the federal firearms laws. . ." (Brief for United States at 18 n.13) and that *Goodheim* should be read narrowly to apply only where the retroactive application of an expansive interpretation of a criminal statute criminalizes conduct that was otherwise innocent. However, the distinction fails in light of the fact that Goodheim was also charged and convicted in the same counts for using a false name as well as for concealing his prior felony conviction when purchasing weapons, and that the evidence at trial showed that in connection with at least one of his purchases he had filled out a state form as well as the federal forms which formed the basis for the charges.*

More fundamentally, the Due Process violation inherent in the retroactive application of a new and broader reading of a federal criminal statute to conduct to which it had been held inapplicable cannot be cured by reference to a state law which forbids acts of a different character and punishes them less severely.** First, for *ex post facto* purposes, interstate travel

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* Brief for the United States in *United States* v. *Goodheim*, Dkt. No. 80-1408 (9th Cir.), filed January 16, 1981, at 2-4.

** The Government's contention that the expansive view of the Travel Act taken in *Perrin* was "foreseeable" is refuted by the Petition (at 16).

with unlawful purpose in violation of federal law is a different crime from commercial bribery in violation of local law. *Woxberg* v. *United States*, 329 F.2d 284, 293 (9th Cir.), *cert. denied*, 379 U.S. 823 (1964); *United States* v. *Carvelli*, 340 F.Supp. 1295, 1302 (E.D.N.Y.), *aff'd*, 464 F.2d 1129 (2d Cir.), *cert. denied*, 409 U.S. 1023 (1972).* Second, the Government's effort to treat the offenses as identical also ignores nearly two hundred years of settled precedent that the *Ex Post Facto* protections of the Constitution forbid not only the retrospective criminalization of conduct not previously prohibited but also the infliction of greater punishment than provided by law for an existing offense at the time of its commission. *Calder* v. *Bull*, 3 Dall. 386, 390 (1798); *Fletcher* v. *Peck*, 6 Cranch 87, 138 (1810) ("An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed.") The incorporation of the protections of the *Ex Post Facto* Clause into the Due Process Clause by *Bouie* includes the concept of enhanced punishment. *Love* v. *Fitzharris*, 311 F.Supp. 702, 703 (N.D. Cal. 1970), *aff'd*, 460 F.2d 382 (9th Cir. 1972), *vacated as moot*, 409 U.S. 1100 (1973):

> This Court sees no reason to say that the logical import of *Bouie* was not to extend the *ex post facto* principle in all its ramifications to any change in the law, whether wrought by legislative amendment, judicial construction, or administrative reinterpretation, which is applied retroactively so as to deprive a criminal defendant of fair notice not only of the criminal nature of his act but also of the punishment to which he will be subject upon conviction.

Even accepting *arguendo* that the Travel Act and the N.Y. commercial bribery statute prohibit the same offense, *Bouie* bars a prosecution under a statute with penalties greater than

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* Indeed, under Section 1952(a), the state law predicate crime need not even be completed for liability to attach under the Travel Act.

those provided by existing law at the time of the crime. Not only were such penalties prescribed by the Travel Act, which is a felony statute, the punishment exacted here greatly exceeded the maximum penalty under the N.Y. commercial bribery statute, which is a misdeameanor.

The only further argument requiring comment is the suggestion that the Due Process contention is "fatally flawed" by the fact that the petitioner could have been prosecuted in the Third Circuit, which had not decided the issue posed by *Brecht* and *Perrin*. (Brief for United States at 21). The short answer to this is that, for the Government's purposes then, the petitioner was not prosecuted in the Third Circuit, and its current effort to avoid constitutional infirmity by arguing what might have been, but was not, is no more valid than its principal assertion that the existence of a state criminal law permits an *ex post facto* prosecution under federal law for a different crime. Apart from this, such authority as did exist at the time in the District of New Jersey, from which petitioner traveled to New York, suggests *Brecht* would have been applied there as well. *United States* v. *Michael*, 456 F.Supp. 335 (D.N.J. 1978), *aff'd without opinion*, 605 F.2d 1198 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980). Finally, no authority is shown for the proposition that a conviction for violation of the Travel Act may rest on travel between two states, in one of which such travel could not violate the statute; no unlawful travel between New Jersey and New York occurred in this case, given *Brecht*.

2. Properly characterizing the taint issue arising under *Kastigar* v. *United States*, 406 U.S. 441 (1972) as "factbound", the Government urges that the District Court's findings are "supported by the record" and do not warrant further review. (Brief for the United States at 10). But a comparison between the factual arguments in the Government's brief (at 10-14) and the findings by the District Court on the *Kastigar* issue (Pet. App. A19-23) shows that the findings of the District Court upon which the Government relies never mention, much less

determine, the *Kastigar* issues raised by this record and briefed by the parties. The petition is an invitation to the Court, not to sit as an appellate factfinder on contested questions of fact, but rather to define as a matter of law the scope of the taint issues that should have been decided on the factual record before the District Court. Except for its fanciful suggestion (at 11) that *United States* v. *Apfelbaum*, 445 U.S. 115, 124-25 (1980), forecloses a single issue (use of immunized testimony in plea bargaining) which *Apfelbaum* never addressed, the Government's brief misses the central point.

The Government's assertions in fact *support* the grant of certiorari. It does not deny that prosecutors who knew the petitioner's immunized testimony participated in strategic decisions in his prosecution or that he was cross examined about matters disclosed in his immunized testimony before the Grand Jury and in a highly publicized criminal trial. Instead, its brief emphasizes the findings of the District Court that Assistant U.S. Attorney Mescon and FBI Special Agent Cassidy were "highly credible" and that both asserted that they were unaware of "the substance of petitioner's immunized testimony" (Brief for the United States at 11, 14). The showing made in the petition, in the absence of any proof of untainted source by the Government, that the immunized testimony was a probable source for petitioner's cross examination is similarly dismissed as "speculati[on]" or "conjectur[e]" (*Id.* at 13, 14).* Other

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* The Government's treatment of the facts in this context is misleading. For example, one significant portion of the cross examination elicited admissions of payments he had made to employees of Hellenic Lines, his company's principal customer. Assistant U.S. Attorney Mescon testified that the cross examination on this point arose from a specific suggestion by Special Agent Cassidy that he ask about such payments and that he had been wholly ignorant of the subject beforehand (H.Tr. 78-80, 118). Cassidy, who had participated in the Scotto trial at which Mr. Seregos had publicly admitted these payments and who was authorized to and did discuss pre-indictment matters involving Mr. Seregos (H.Tr. 85-87, 102-103), did not offer any source whatever for his suggestion. The lengthy argument in the Govern-

contentions are dismissed for failure to show "prejudice". (*Id.* at 12). But *Kastigar* requires not merely that the Government show that its prosecution was not tainted by the defendant's previous immunized testimony but *also* imposes "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony," 406 U.S. at 460, including its cross examination of the defendant, *New Jersey* v. *Portash*, 440 U.S. 450 (1979), and its trial strategy and plea bargaining. *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). Factual arguments by the Government in its brief in this Court on contested issues are not such proof, and silence by the District Court is not findings.

The promise the Court made in *Kastigar* means little if the failure by the District Court to address the taint issues raised by the record, and the failure of the Government to discharge *its* burden under *Kastigar* to show an untainted source for its evidence, can be explained away, as the Government seeks to here, by the mere assertion of Government witnesses, however credible, that they were ignorant of "the substance" of the defendant's immunized testimony, or by a reliance on the *petitioner's* failure to show prejudice or to establish beyond doubt a tainted source when the Government has shown no source at all. The issue raised by this petition is whether *Kastigar* is a promise the Court means to have kept.

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ment's brief (at 13 n.5) that the question was asked as part of "the natural development of cross-examination" has no foundation in the testimony. The fact that Mr. Mescon did not "learn" that the payments had been made until it was admitted on cross examination (*Id.* at 13) does not excuse the asking of a question based on a tainted source.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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